Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

PHILIP T. EICHELBERGER, JR., Individually, and as Administrator and Trustee of the P. T. Eichelberger, Jr., M.D. P.A. Integrated Profit Sharing Plan, and REBA A. EICHELBERGER,

Petitioners,

vs.

W. STEVE SMITH, TRUSTEE, and JANE HAYTON,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Supreme Court's decisions in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988) and *Liteky v. United States*, No. 92-6921 concerning 28 U.S.C. Section 455(a) and 455(b) are contradictory that would result in violations of the United States Constitutional rights of due process if a person attempted to rely on them.

2. Whether Petitioner's appeal was properly dismissed as frivolous and Petitioner and his attorney sanctioned for filing an appeal with issues involving 28 U.S.C. Sec. 455(a)(b) when the U.S. Justices are divided as to the meaning of 28 U.S.C. Sec. 455(a)(b) as seen by comparison of *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988) and *Liteky v. United States*, 114 S. Ct. 1147 (1994).

3. Whether Petitioner's appeal was properly dismissed as frivolous and Petitioner and his attorney sanctioned for filing an appeal of judgments and orders that violate Constitutional rights, Federal statutory law and conflict with decisions of this Court and the Fifth Circuit.

4. Whether extra contractual damages awarded under ERISA to a plan participant's ex-spouse are large punitive damages that are unconstitutional and unlawful.

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PHILIP T. EICHELBERGER, JR., Individually, and as Administrator and Trustee of the P. T. Eichelberger, Jr., M.D. P.A. Integrated Profit Sharing Plan, and REBA A. EICHELBERGER,

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The Petitioners, Philip T. Eichelberger, Jr., M.D., Individually, and as Administrator and Trustee of the P. T. Eichelberger, Jr., M.D. Professional Association Profit Sharing Plan, and Reba Eichelberger, as attorney, respectfully prays that a writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 4, 1994, and September 10, 1994.

DECISIONS BEFORE THE COURT OF APPEALS

One day after oral argument, on August 4, 1994, the Court of Appeals dismissed Petitioner's appeal of District Court case number 90616, *Smith v. Eichelberger,* as frivolous and sanctioned Petitioner and his attorney, Reba A. Eichelberger, $5,000.00 under FRAP 38. On September 10, 1994, the Court of Appeals denied Petitioner's Motion for Rehearing, Petition for En Banc Hearing, and Motion to Disqualify the District Judge under 28 U.S.C. Sec. 144, 455(a)(b). Copies of the opinions appear in the Appendix to this Petition.

JURISDICTION

The judgment in District Court case number 90616 for Intervenor Jane Hayton was signed on June 8, 1993. The judgement of the Court of Appeals was entered on August 4, 1994. The order denying the Motion for Rehearing was denied on September 10, 1994. On November 28, 1994, Justice A. Scalia granted Petitioner's request for an extension to file the Petition for Writ of Certiorari to February 6, 1995. The petition for writ of certiorari is filed by February 6, 1995. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1) and 28 U.S.C. Section 2101(e). This Court's power, authority and commitment is invoked under 28 U.S.C. Section 453.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. Section 455, applicable to all justices, judges, and magistrates, provides in relevant part:

> "(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> "(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding:

28 U.S.C. Section 1334(c)(1):

> Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State Courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

28 U.S.C. Section 1334(c)(2):

> Any decision to abstain or not to abstain made under this subsection is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.

28 U.S.C. Section 453. Oath of justices and judges.

> Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office:

> I,___, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ___ under the Constitution and laws of the United States. So help me God."

Federal Rules of Appellate Procedure Rule 38 Damages for Delay provides:

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

As amended April 29, 1994, eff. Dec. 1, 1994,

FRAP Rule 38 provides:

> If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double cost to the appellee.

Constitution

U.S. Const. Amendment V (Due Process Clause)

STATEMENT OF THE CASE

In 1979, when ERISA was in its infancy, Jane and Philip Eichelberger, Jr., M.D. were divorced. The divorce decree contained provisions concerning Dr. Eichelberger's pension plan benefits, that were 30%

vested and covered by ERISA. The plan contained the mandatory requirement that no plan benefits could be assigned or alienated. Plan participants had no right to a segregated account or to direct investment funds. Dr. Eichelberger was employed by the plan sponsor, P. T. Eichelberger, Jr., M.D. Professional Association and served as the plan administrator and trustee. As plan administrator and trustee, he retained a law firm that specialized in pension plan to maintain plan records and compliance with ERISA.

When Dr. Eichelberger, as plan administrator and trustee of a defined benefit plan, refused to segregate plan funds and permit his ex-wife to direct investments, she began to file lawsuits to enforce the preempted divorce decree provisions. (Appendix 18). Except for the year 1980, there has not been a single year that J. Hayton has not been in court suing Dr. Eichelberger over the 1979 divorce decree provisions. (Appendix 18). She has retained in excess of fifteen attorneys, including the prestigious law firms of Haynes and Fullenweider, Fulbright and Jaworski, Hrdlicka and Chamberlain.

On April 23, 1987, P. T. Eichelberger, Jr., M.D., individually filed for relief under 11 U.S.C. Chapter 11. The professional association and plan were not parties in the bankruptcy case. The case was converted in 1989 and W. Steve Smith was appointed Trustee of the P. T. Eichelberger, Jr., M.D. bankruptcy estate.

On July 30, 1988, Jane Hayton filed an adversary proceeding, (her fourth lawsuit) under 11 U.S.C. Sec. 523(a)(4) against Dr. Eichelberger, individually, based on the divorce decree, seeking to have the debt, if any,

declared nondischargeable. The bankruptcy court abstained from hearing the damage issue and granted Jane Hayton's Motion for Summary Judgment, that a debt, if any, caused by Dr. Eichelberger, individually, under the divorce decree was non-dischargeable. (Appendix 17). Judge Hughes affirmed the judgment.

On August 28, 1989, Jane Hayton amended her state court lawsuit to join Dr. Eichelberger, Plan Administrator and Trustee, Professional Association and the Plan. The defendants removed the case to Federal Court. On October 5, 1989, Jane Hayton filed an emergency motion for remand and abstention pursuant to 28 U.S.C. Secs. 1334(c)(1), 1447(c) and 1452(b). (Appendix 18). The district court divested itself of jurisdiction in the entire case by order of remand. (Appendix 6). On April 24, 1990, Judge Hughes denied the motion for rehearing and consolidation with case number 90616. (Appendix 7).

In February and March of 1990, W. Steve Smith, as Trustee filed two lawsuits, (this case) against Dr. Eichelberger, Jr., and the Professional Association. He did not file any adversary proceedings under 11 U.S.C. Sec. 523. On September 17, 1991, Judge Hughes granted J. Hayton's intervention "for the limited purpose of securing her interest upon termination of the Integrated Profit Sharing Plan." (Appendix 10).

Because of Judge Hughes' conduct and display of absolute animosity towards Dr. Eichelberger, and his predisposition to grant the adverse parties any request based on false allegations, by W. Steve Smith, Dr. Eichelberger filed a motion to disqualify Judge Hughes. (Appendix

19). Judge denied the motion. (Appendix 9). On December 18, 1992, Judge Hughes, after ex parte conference (Appendix 13, Appendix 20 @31) ordered his court appointed trustee to terminate the plan. (Appendix 11). J. Hayton settled with W. Steve Smith, Trustee, Karen Cole, Plan Trustee, and the Professional Association. (Appendix 12). The plan was terminated and all assets distributed by Karen Cole by December 21, 1992. Dr. Eichelberger received nothing.

On December 8, 1992, Judge Hughes acting as the co-counsel for the adverse parties as to the best strategy for J. Hayton to recover the greatest amount from Dr. Eichelberger advised, "But if you have a non-dischargeable claim you could then not claim among the general creditors – ,

Trustee Smith: You could do both.

The Court: I know, I'm making a suggestion. You could pursue the post petition debtor.

In response to an objection to the Court's gross partiality, the the Court responded,

> "Miss Eichelberger, there is an action pending in state court to liquidate the claim against him for breach of his fiduciary duty, so why are you objecting to us discussing the pendency of that claim in this action?" (Appendix 20 @ 30, 31).

On April 15, 1993, Judge Hughes announced that he was going to conduct a bench trial on J. Hayton's claims. (Appendix 22). There was one major problem. She had no claims pending before the district court. On April 23, 1993, J. Hayton filed her alleged claims that were clearly

barred. (Appendix 23). Over the objections of Dr. Eichelberger, Judge Hughes began the bench trial on May 4, 1993. (Appendix 24). In response to Dr. Eichelberger's application for writ of mandamus, Judge Hughes with full knowledge, that the claims for the non-dischargeable debt, if any, were pending in state court, breached his judicial oath when he stated to the Fifth Circuit,

> "This court began hearing this week the claims by Hayton against Eichelberger under the Employee Retirement Income Security Act of 1974 for breach of his fiduciary duty as trustee and administrator of several formal ERISA plans."

The truth is that on April 23, 1993, there was no plan, the single ERISA plan had been terminated on December 21, 1992, by Judge Hughes. Since October 10, 1989, Dr. Eichelberger had been enjoined from his duties as the plan administrator or trustee when J. Hayton got a temporary injunction in the remanded state court lawsuit, plus. In June 1990, Judge Hughes appointed Karen Cole as plan trustee and ordered all plan funds and assets turned over to her , based on the false allegations of W. Steve Smith. From that point on Judge Hughes, Karen Cole and W. Steve Smith controlled the pension plan and its assets. Karen Cole, court appointed trustee, distributed the plan assets without appraisal of partnership interests in real property or consideration of the actual sales price of the real property, by December 31, 1992. Judge Hughes refused to permit any questioning of Karen Cole. P. T. Eichelberger, plan participant received nothing. (Appendix 25 @ 92)

On June 8, 1993, Judge Hughes, who had made no attempt to conceal his deep seated hatred and animosity

for petitioner, and whose predisposition is well documented in his own words, entered a judgment, without jurisdiction, against Dr. Eichelberger for over $900,000.00, for alleged claims plainly barred by his disqualification under 28 U.S.C. Secs. 455(a)(b), his remand order, limitations, waiver, discharge in bankruptcy, accord and satisfaction. (Appendix 4). The damages were based on the hearsay and false testimony of J. Hayton's husband, Ben Hayton and the speculation of Trustee Cole. The plaintiff, W. Steve Smith, and his attorney, Janet Mortenson, never appeared for trial. The judgment is void of any mention of W. Steve Smith, his claims, or the counterclaim of Dr. Eichelberger. (Appendix 4).

On August 4, 1994, one day after oral argument, the Fifth Circuit, without a word, opinion, or explanation, dismissed the appeal as frivoulous and sanctioned Petitioner and his attorney $5,000.00. (Appendix 1). On September 9, 1994, still without a word of explanation denied Petitioner's motion for rehearing, and petition for en banc hearing. (Appendix 2). Judge Robert Parker, who faces analogous issues pertaining to his actions as a district judge, denied Petitioner's Motion for Disqualification of Judge Hughes. (Appendix 3, 25).

On August 26, 1994, Judge Hughes granted W. Steve Smith, as Trustee of the Bankruptcy estate of P. T. Eichelberger, Jr., M.D. over $165,000.00 for legal fees. As Trustee, W. Steve Smith has not paid a single creditor of Dr. Eichelberger a single penny. He has not investigated the claims or even requested that the clerk prepared an account for the creditors. Payment for the fees came from the contract of sale for Dr. Eichelberger's previous home

and the Professional Association's $75,000.00 allegedly owed to the pension plan. (Appendix 15).

On January 20, 1995, Judge Hughes signed an order for hearing on "pending motions." (Appendix 16).

On June 4, 1993, the Fifth Circuit denied Petitioner's complaint brought under 28 U.S.C. Sec. 372 because "the Judicial Conduct and Disability Act of 1980 is not to be used as a substitute for appropriate appellate supervision and review." Judge Hughes did not file a response. On August 5, 1993, The Fifth Circuit Judicial Council voted to affirm the order.

REASONS FOR GRANTING THE WRIT

This court should grant the writ to protect the integrity of this Court and the belief and trust of citizens and petitioners such as Dr. P. T. Eichelberger, Jr., and attorneys such as Reba Donatto Eichelberger, that an appeal based on the United States Constitution, federal law and the law of this Court, is an appeal as a matter of law, and cannot be the basis for dismissal as frivolous and sanctions.

Petitioner and his wife, did not come from the socially advantaged class, or graduate from the Ivy League Schools. P. T. Eichelberger, Jr., worked as a pharmacist to become a medical doctor. Reba Donatto, born of poor parents, a high school dropout, worked as an associate degree registered nurse, and attended nightschool for seventeen years to earn a Baccarlaureate Degree in Science, Masters Degree in Health Care Administration and

a law degree. The appeal filed was not frivolous and Petitioner and his attorney do not deserve to be sanctioned.

As a matter of law, and judicial oath, in order to deny this Petition for Writ of Certiorari, this Court is required to find the following:

(1) that Dr. Eichelberger and Reba Eichelberger, in complete disregard of the law, pursued a frivolous appeal and deserved to be sanctioned;

(2) that the judges and justices do not have to abide by their judicial oath to enforce the Constitution and Federal law;

(3) that although the judges and justices disagree about the interpretation of Federal statutes at issue in the appeal, it is frivolous to appeal a judgment concerning those laws and decisions;

(4) that although district and appellate judges have previously decided issues that firmly support Petitioner and his attorney's appeal, the appeal can be dismissed as frivolous and Petitioner and his attorney can be sanctioned for appealing the orders and judgment, without notice, opinion or explanation.

This Court should grant this Petition for Writ of Certiorari to clearly and emphatically state as supreme law of the land the interpretation of 28 U.S.C. Section 455(a)(b), provisions in the bankruptcy code and ERISA, in plain language, that is understood by a reasonable person, not just judges, justices, and lawyers. In support of that position, Petitioner and his attorney, present the following questions that require review by this Court.

I. THE SUPREME COURT DECISIONS CONCERNING 28 U.S.C. SEC. 455(A)(B) ARE CONTRADICTORY AND REQUIRE CLARIFICATION TO AVOID VIOLATIONS OF THE U.S. CONSTITUTIONAL RIGHTS OF DUE PROCESS BY THOSE WHO MAY RELY UPON THEM.

In 1974, Congress made major revisions to 28 U.S.C. Secs. 455(a)(b) to broaden the base for disqualification of a judge and to conform with the ABA Code of Judicial conduct. This Court granted certiorari in *Liljeberg v. Health Services Acquisition, supra,* to consider construction of Section 455(a) and the application of FRCP Rule 60(b) for violation of the rule in the case of a final judgment. In 1988, the Court interpreted the Section 455(a) recusal provision covering both "interest or relationship" and "bias or prejudice" grounds to mean that recusal was required whenever "impartiality might reasonably be questioned."

The Court compared Section 455(a) with Section 455(b) and rejected the Petitioner's contention that Section 455(a) must be construed in light of Section 455(b). In the dissenting opinion of Chief Justice Rehnquist joined by Justice White and Scalia, they found (b) of Section 455 sets forth more particularized situations in which a judge must disqualify himself.

In *Liteky v. U.S., supra,* the case presented the question whether recusal under 28 Section 455(a) was subject to the limitation that is known as the "extrajudicial source" doctrine. The Court, after comparing Section 455(a) and (b), in a surprising and confusing statement, then holds "Section 455(b)(1), which addresses the matter of personal bias and prejudice specifically, contains the

"extrajudicial source" limitation – and that limitation (since nothing in the text contradicts it) should govern for purposes of Section 455(a) as well." The Court further holds that disqualification for intrajudicial partiality is not required unless it would make a fair hearing impossible. That does not appear to coincide with the principle envisioned by Congress when it strengthened Section 455(a) to include disqualification if there is the appearance of impropriety.

The two opinions appear to conflict but at least, there is agreement between the two opinions that disqualification can occur based on judicial remarks made during a judicial proceeding:

(1) they may do so if they reveal an opinion that derives from an extrajudicial source;

(2) they will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

In the opinion of Petitioner and his attorney, the opinion that most correctly states the purpose of Congress in reforming 28 U.S.C. Section 455(a)(b) in 1974, is the statement found in the concurring opinion in *Liteky v. U.S., supra*, "Thus, under Section 455(a), a judge should be disqualified only if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute. . . . One of the very objects of the Law is the impartiality of its judges in fact and appearance. . . . The relevant consideration under Section 455(a) is the appearance of partiality, see *Liljeberg, supra* at 860, 108 S. Ct. at

2202-03, *supra,* not where it originates how it was disclosed."

The Court's decision appears confusing as to the effect of limitations contained in 28 U.S.C. Section 455(b) as applicable to 28 U.S.C. Section 455(a). The Court should grant the petition and clarify the precedents contained in the two opinions.

II. DISMISSAL AND SANCTIONS TO PENALIZE AN APPEAL OF ISSUES CONCERNING 28 U.S.C. SEC. 455(A)(B) ON WHICH THE U.S. JUSTICES ARE DIVIDED DEPRIVES A PERSON OF CONSTITUTIONAL RIGHTS OF DUE PROCESS, AND ACCESS TO THE COURTS FOR A MEANINGFUL REVIEW.

The Fifth Circuit has dismissed Petitioner's appeal and sanctioned Petitioner and his attorney for appealing a judgment with issues pertaining to 28 U.S.C. Sec. 455(a)(b) whose interpretation divides members of this Court.

Dr. Eichelberger's motions for disqualification of Judge Lynn Hughes, under 28 U.S.C. 455, are based on the judge's attitude, and conduct beginning three years prior to the trial. The transcripts of the hearings in 1991, 1992 and 1993, including the trial beginning on May 4, 1993, document the two requirements this court in *Liteky,* held would be adequate for disqualification: (1) information acquired from an extra judicial source was relied upon; (2) a display of such deep-seated and unequivocal antagonism that rendered fair judgment impossible."

As Justice Kennedy, joined by Justices Blackmun, Stevens and Souter, so clearly stated, "Thus under Section 455(a), a judge should be disqualified only if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute.

The statute does not refer to the source of the disqualifying partiality. And placing too much emphasis upon whether the source is extrajudicial or intrajudicial distracts from the central inquiry. One of the very objects of Law is the impartiality of its judges in fact and appearance."

In *Concrete Pipe and Products of California v. Construction Laborers Pension Trust for S. California,* 113 S.Ct. 2264 (1993), this Court held: "Due process requires a neutral and detached judge." Since 1792, Congress has sought to protect its citzens' Constitutional rights by enacting federal laws that compel district judges to recuse themselves when they have an interest in the suit or been counsel to a party. In 1821, the basis for recusal was expanded to include all judicial relationship or connection with a party. In 1911, Congress expanded the law to include recusal for bias in general. In 1970, Congress enacted 28 U.S.C. Sec. 455 that prohibited a judge presiding who had an interest in the case or relationship to a party. In 1974, Congress decided there was a need for greater protection of constitutional rights of due process by disqualifying or recusing any judge from hearing a case if there was bias, prejudice or the appearance of lack of impartiality. Congress broaden the basis for disqualification by revising 28 U.S.C. Section 455 to include Section 455(a) a provision

for disqualification if there was an appearance of impropriety. The law does not speak to source or limitations on the appearance of impropriety.

Congress by the revision of Section 455(a)(b) was honoring its commitment to uphold the Constitutional right of due process and equal protection, just as this Court honored its oath regarding the same constitutional rights in *Ward v. Village of Monroeville*, 93 S.Ct. 80, 84 (1972) and *Concrete Pipe and Products of California v. Construction Laborers Pension Trust for S. California*, 113 S.Ct. 2264 (1993) for a fair and impartial judge.

Since the 1974 revision of 28 U.S.C. Section 455(a)(b) this Court has decided two cases involving the interpretation of the statute and the decisions appear to conflict one another.

Given the court's statements in *Liteky v. U.S., supra*, concerning the word "personal", a clear reading of the statute would require disqualification of a judge under 28 U.S.C. Section 455(a) and 455(b) for any bias or prejudice, or where his impartiality may reasonably be questioned.

A comparison of the Court's decision in *Liljeberg v. Health Services Acquisition Corp.* and *Liteky v. U.S.* reveals an unclear or ambiguous interpretation as to what the Court is really saying. Neither 28 U.S.C. Section 455(a) nor (b)(1) contains the "extrajudicial source" limitation.

The statutory language, required by the Constitution to be understood by the citizens, not just lawyers and judges, is clear. If Congress's purpose for writing the law was to protect a citizen's right to a fair trial before an objective and impartial judge, the issue is not the source

but the presence or the lack of impartiality. If a judge counsels one of the party to a lawsuit as to the best strategy to win the greatest benefit in a future proceeding, and has ex parte conferences with one side, it does not matter when that judge decided the party was the winner, how he decided the winner, or why he made the decision, he has clearly demonstrated his bias and prejudice if, before hearing the matter at trial and the evidence, he made a predisposition of the issues. He is disqualifed as a matter of law. Far more serious he has violated his judicial oath that constitute cause for review by this Court.

Petitioner's appeal was pending in the Fifth Circuit when both decisions were the supreme law of the land. Petitioner had sought the disqualification of the district judge based on extra and intrajudicial prejudice. (Appendix 19). He denied the motion. (Appendix 9). Petitioner filed a motion for disqualification with the Fifth Circuit because although the judgment in the case is considered final, Judge Hughes continues to write orders and conduct hearings in the case. (Appendix 15, 16).

Judge Robert Parker denied the motion for disqualification. The transcripts and record in the case reveal the district court judge's bias and prejudice against Dr. Eichelberger, predates May 31, 1990, before evidence or the opportunity to present evidence in the case. On May 31, 1990, Judge Hughes stated on the record,

> " . . . Your're talking about a man who went bankrupt in order to avoid meeting his fiscal responsibilities. And now you want his ex wife whom he litigated with for ten years over whether she was entitled to any of the pension

> funds in the first place, to trust him to, if he cheats, to have enough in his share to make up her share" . . . The history of this litigation is replete with self destructive acts."

Judge Hughes issued adverse orders against Dr. Eichelberger, after ex parte conferences with the adverse parties, (Appendix 13), and denied the conference until admitted by the adverse parties. (Appendix 20 @ 31,33). On December 8, 1992, the transcript documents Judge Hughes acting as co-counsel to adverse parties as to the best strategy to recover the greatest amount from Dr. Eichelberger on matters that had not been litigated. (Appendix 20). Judge Hughes excused his actions in response to an objection, that it was okay to discuss the claim in the federal court because the claims were pending in State Court. (Appendix 20). Again on January 15, 1993, Judge Hughes, again assisting J. Hayton and Trustee Smith, and disregarding Dr. Eichelberger, as the debtor, declares, "The place to argue that it's going – should be a nondischargeable debt is by getting a proper judgment in his favor in state court. . . . so his interest is protected by my remand of the issue of damages to the state courts." Judge Hughes without hesitation announced on the record that, "Miss Hayton to have a nondischargeable claim against Dr. Eichelberger must prevail in the state court. (Appendix 21 @ 13). The records reveal these are the true facts of the case. The court had remanded the claims to State Court at J. Hayton's emergency motion on October 6, 1989. (Appendix 6, 7, 18, Appendix 21 @ 6, Appendix 14). The only non-dischargeable Hayton debt, if any, was based on the remanded claims. (Appendix 17, 18, Appendix 21 @ 6, 13).

On April 15, 1993, after acting as co-counsel to J. Hayton, Judge Hughes announces that he is going to conduct a bench trial on J. Hayton's claims. (Appendix 22). There was one major problem, J. Hayton has no claims pending in the District Court. Her intervention for the sole purpose of securing her interest in the pension plan is moot. (Appendix 10). The plan was terminated and assets distributed by December 21, 1992, with Hayton's agreement and settlement with the plan, sponsor of the plan and W. Steve Smith, by orders of the court. (Appendix 11, 12).

On April 23, 1993, J. Hayton filed her claims, pursuant to the suggestions of Judge Lynn Hughes and the agreement between Judge Hughes, Jeffrey Gillespie, attorney for Jane Hayton and W. Steve Smith on December 8, 1992. (Appendix 20, 23). Over Petitioner's strenuous objections, Judge Hughes, began a bench trial on May 4, 1993, on the claims that he had acted as co-counsel for J. Hayton. During the trial, he counseled Jeffrey Gillespie, as to the evidence and proof, he needed to offer. He ridiculed and permitted J. Gillespie to harass Dr. Eichelberger. He accepted as credible his court appointed plan trustee Karen Cole's testimony and her report and opinion concerning the 1979 divorce decree as a qualified domestic relations order although she admitted she was not a practicing attorney and had not prepared the report.

In 1986, a federal judge had refused to find the divorce decree a "qualified domestic relations order", and two state court judges and the Fourteenth Court of Appeals had failed to find the divorce decree a "qualified domestic relations order."

In the present case, there can be no denial of the district judge's knowledge of the facts that mandate recusal under 28 U.S.C. Section 455(a) and Section 455(b) and vacation of the void judgment.

The appellate court's order conflicts with this Court's decisions in:

> *Liljeberg v. Health Services Acquisition Corp.* 486 U.S. 847, 108 S.Ct. 2194 (1988).
>
> *Liteky v. United States,* 114 S.Ct. 1147 (1994).
>
> *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 825 (1986):
>
> Due process clause requires disqualification when necessary to satisfy the "appearance of justice."

The errors, when examined in the contest of this entire case constitute "plain error" because they are so obvious, substantial and blatant, that failure to notice and correct them affects the fairness, integrity and public reputation of judicial proceedings. See, *United States v. Lleike,* 950 F.2d 214, 219 (5th Cir. 1991).

III. PETITIONER'S APPEAL WAS IMPROPERLY DISMISSED AS FRIVOLOUS AND PETITIONER AND HIS ATTORNEY SANCTIONED BECAUSE THE JUDGMENT, ENTERED WITHOUT JURISDICTION, IN VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHTS OF DUE PROCESS, PROTECTION, JURY TRIAL AND ACCESS TO COURTS, DIRECTLY CONTRADICTED DECISIONS BY THIS COURT AND THE FIFTH CIRCUIT RELIED UPON BY PETITIONER AND HIS ATTORNEY.

One day, after oral argument, on August 4, 1994, without notice or warning, the Fifth Circuit improperly

dismissed Petitioner's Appeal as frivolous and sanctioned Petitioner and his attorney. The Court gave not a single word of opinion or explanation. In *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 767 (1980) this Court enunciated the basic principle that notice and opportunity to respond must precede the impositions of sanctions. Although TRAP 38 amended on April 29, 1994, to include that provision did not become effective until December 1, 1994, as a matter of law, the Fifth Circuit is without authority to ignore this Court's law effective since 1980.

The appeal of the judgment and orders in this case is not frivolous. The law is well settled upon the issues presented in the appeal concerning lack of jurisdiction due to remand, and abstention, limitations, extracontractual damages and preemption by ERISA, discharge in bankruptcy, judicial estoppel, accord and satisfaction, res judicata as to forum, and completely support Petitioner's position. The District Court and the Appellate Court's judgements and orders directly conflict with those laws.

The district court had clearly divested itself of jurisdiction in the case on October 6, 1989, at J. Hayton's request. (Appendix 6, 7, 18). The State Court assumed jurisdiction over the case on October 10, 1989, at J. Hayton's request.

On April 15, 1993, The District Court was totally without jurisdiction on all matters pertaining to J. Hayton. Her claims based on her intervention was moot by termination of the plan and her settlement with the plan, plan sponsor and bankruptcy estate. Her alleged claims against Dr. Eichelberger as Plan Administrator and

Trustee, were barred by ERISA (Appendix 11, 23), discharge order (Appendix 8), limitations (Appendix 24), settlement with the plan (Appendix 12), judicial estoppel by her emergency request for remand(Appendix 18), remand order (Appendix 6), and res judicata as to forum by two final unappealed Federal judgments and orders (Appendix 18).

The District Court and Appellate Court's judgments and orders are in direct conflict with the following Supreme Court and Fifth Circuit law:

Ward v. Village of Monroeville, 93 S.Ct. 80, 84 (1972) and *Concrete Pipe and Products of California v. Construction Laborers Pension Trust for S. California,* 113 S.Ct. 2264 (1993) "a fair and impartial judge."

United States v. Rice, 66 S.Ct. 835, 1946):

"It is axiomatic that remanding a case to state court terminates the jurisdiction of a federal bankruptcy or district court over that case."

New Orleans Public Service, Inc., v. Majoue, 802 F.2d 166 (5th Cir.):

"Not only may the order not be appealed, but the district court itself is divested of jurisdiciton to reconsider the matter. Thus, even if it later decides the order was erroneous, a remand order cannot be vacated even by the district court."

Hogan v. Kraft Foods, 969 F.2d 142 (5th Cir.1992); Applicable statute of limitations for a 1132(a)(1)(B) claim under ERISA in Texas is four years.

Sommers Drug Stores v. Corrigan Enterprises, Inc., 793 F.2d 1456 (1986): The phrase "to the

> extent" indicates that a person is fiduciary only with respect to those aspects of the plan over which he exercises authority or control."
>
> *Massachusetts Mutual Life Insurance Co. v. Russell,* 105 S.Ct. 3085, 3094 (1985):
>
> ERISA 409(a), 29 U.S.C. Sec. 1109(a) (1982) provides only for breaches of fiduciary duty to a plan, not to an individual, and does not provide for extracontractual damages to an individual beneficiary.

Perhaps even more startling than dismissal of an appeal that is rooted in well settled law that supports Petitioner's position is that fact, not only the complexity of the interpretation of 28 U.S.C. Section 455(a)(b) was before this Court but the fact that at the time of Petitioner's appeal the Fifth Circuit was reviewing an appeal in *Hooks v. The Morrison Milling Company,* No. 93-4115 with analogous issues pertaining to remand and preemption by ERISA. To insure correctness of their decision, the Court requested amicus curiae briefs from the Labor Department and the Texas Attorney General.

The only possible reason the court could have considered the appeal frivolous would be based on the judgment not being a final judgment. Plaintiff Smith did not appear, present any testimony, or evidence, and the judgment does not mention him, his claims or Petitioner's counterclaims. Petitioner, in the motion for rehearing and petition for en banc hearing, requested an answer to the enigma. A bare terse denial was the answer.

IV. EXTRACONTRACTUAL DAMAGES AWARDED UNDER ERISA TO A PLAN PARTICIPANT'S EX-SPOUSE ARE LARGE PUNITIVE DAMAGES THAT ARE UNCONSTITUTIONAL AND UNLAWFUL.

The court appointed plan trustee, Karen Cole, testified that J. Hayton was entitled to $130,686.00 (30% of which was vested) under the divorce decree, at 6% interest, $268,225.18, at 7% interest, $301,190.19 and at 8% interest, $337,859.10 as of April 30, 1992 from the plan. On December 21, 1992, J. Hayton settled with the plan and the plan sponsor and receives a distribution of $149,627.66. The distribution included a 6% land partnership interest in 24.129 acres, fully paid, valued by the trustee, without appraisal or consideration of the actual sales price at $33,093.00. At that time actual sale proceeds of 63,252 square feet was $30,360.96 for 6%, leaving 6% in the remaining 22 acres, selling at $8.00 a square foot valued by Trustee Cole at $2,733.00. (Appendix 24). The Court awarded J. Hayton over $900,000.00.

In *Mutual Life Insurance Co. v. Russell, supra,* this Court held that extracontractual damages to a beneficiary are not provided by ERISA under the provision sued under. The damages can be considered nothing but large punitive damages that are unconstitutional and unlawful. This Court has granted certiorari to decide if large punitive damages are unconstitutional in *DMW v. Gore,* NO. 94-896. This case should be joined with *BMW v. Gore,* now pending in this court.

Lastly, this Court should grant this writ because both the District Court and the Appellate Court, have so far departed from the accepted and usual course of judicial

proceedings as to call for an exercise of this Court's power of supervision to maintain the integrity of the justice system. Based on the above well documented violations of the United States Constitution, federal law, judicial oath, and just plain justice, Petitioner and his attorney, humbly pray that this Court review the orders and judgments presented in this petition. If this Court does not protect a person's Constitutional rights and enforce the law and the judicial code, who does? Can the justices on this Court turn their back on such conduct and actions without violating their own judicial code? We think not. This is the United States and the rights we speak of are protected by the United States Constitution and you.

CONCLUSION

For the above cited reasons, a Writ of Certiorari should issue to review the judgment of the Fifth Circuit.

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Appendix

1. 8/4/93 Fifth Circuit order dismissing appeal as frivolous after oral argument on 8/3/94 sanctions of $5,000.00.....App. 1

2. 9/10/94 Motion for rehearing and petition for hearing en banc denied..... App. 3

3. Judge Robert Parker's order denying motion for disqualification.....App. 5

4. 6/8/93 Judgment after "bench" trial.....App. 6

5. 6/8/93 Order denying motion for rehearing..... App. 8

6. 10/6/89 Order of Remand.....App. 9

7. Order denying order of remand and request for consolidation.....App. 10

8. 11/19/90 P. T. Eichelberger, Jr., M.D.'s discharge order..... App. 11

9. Order denying Motion for Disqualification... App. 13

10. Order granting Jane Hayton's intervention for sole purpose of giving her her pension benefits.....App. 14

11. Order terminating pension plan..... App. 16

12. Hayton's agreed settlement with plan..... App. 17

13. Ex parte conference..... App. 21

14. 5/5/93 Judge Hughes judicially admits to the Fifth Circuit the claims are in State Court App. 23

15. 8/26/94 Order granting compensation to W. Steve Smith, Trustee by Judge Hughes.....App. 25

Appendix – Continued

16. 1/20/95 Order by Judge Hughes for hearing in case for "pending motions"..... App. 27

17. Excerpt of Bankruptcy Court's Order granting summary judgment for Hayton's claims against PTE, Individually..... App. 29

18. Hayton's emergency motion to remand case to state court..... App. 33

19. Motion for Disqualification of Judge Hughes..... App. 42

20. Excerpt of transcript of 12/8/92.....App. 50

21. Excerpt of transcript of 1/15/93.....App. 62

22. Excerpt of transcript of 4/15/93.....App. 67

23. 4/23/93 Hayton files her alleged claims...App. 70

24. 4/29/93 PTE responds to Hayton's alleged claims..... App. 73

25. Request for disqualification to Fifth Circuit en banc.....App. 82

26. 11/28/94 Supreme Court order granting extension to file petition for writ of certiorari to February 6, 1995..... App. 95

APPENDIX 1

IN THE UNITED STATE COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2481

W. STEVE SMITH,

Plaintiff-Appellee,

JANE BAILEY HAYTON,

Intervenor-Plaintiff-Appellee,

VERSUS

P. T. EICHELBERGER, JR., M.D., et al.,

Defendants,

P. T. EICHELBERGER, JR., M.D.,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

(Filed Aug. 4, 1994)
(CA-H-90-616)

Before REYNALDO G. GARZA, SMITH, and PARKER, Circuit Judges.

PER CURIAM:*

This appeal is frivolous and is DISMISSED pursuant to 5TH CIR. R. 42.2. Pursuant to FED. R. APP. P. 38, we assess double costs, plus $5,000 attorneys' fees, against appellant and his attorney. *See Coghlan v. Starkey*, 852 F.2d 806 (5th Cir. 1988) (per curiam).

---

*Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

APPENDIX 2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2481

W. STEVE SMITH,

Plaintiff-Appellee,

JANE BAILEY HAYTON,

Intervenor-Plaintiff, Appellee,

versus

P. T. EICHELBERGER, JR., M.D., ET AL.,

Defendants,

P. T. EICHELBERGER, JR., M.D.,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion August 4, 1994, 5 Cir., ___, ___ F.3d ___)

(September 9, 1994)

Before REYNALDO G. GARZA, SMITH and PARKER, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the

Court having requested that the Court be polled on rehearing en banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration(s) of this cause en banc, and a majority of the judges in active service not having voted in favor, rehearing(s) en banc is (are) DENIED.

ENTERED FOR THE COURT:

/s/ Illegible
United States Circuit Judge

APPENDIX 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 93-2481

P.T. EICHELBERGER, JR., M.D.
APPELLANT

V.

W. STEVE SMITH and JANE BAILEY HAYTON
APPELLEES

ORDER

(Filed Sept. 13, 1994)

The appellant's Request for Disqualification of District Judge Lynn N. Hughes and appellant's Request for Judicial Notice in Support of Suggestion for Rehearing En Banc are hereby DENIED.

/s/ Robert M. Parker
Robert M. Parker
Circuit Judge

APPENDIX 4

UNITED STATES DISTRICT COURT		SOUTHERN DISTRICT OF TEXAS
W. STEVE SMITH, Trustee, Plaintiff,	§	Civil Action H-90-616
JANE BAILEY HAYTON, Intervenor,	§	Adversary 90-079
versus	§	Bankruptcy 87-03998-H5-7
P. T. EICHELBERGER, JR., Defendant.	§	

FINAL JUDGMENT

(Entered Jun. 11, 1993)

Jane Bailey Hayton shall recover from P. T. Eichelberger, Jr.:

1. Principal of $833,263.24;

2. Prejudgment interest at 6% from October 30, 1992, of $27,257.97;

3. Attorneys' fees totalling $108,367.72 for:

   A. Jeffrey W. Gillespie: $65,625.00
   B. Chamberlain, Hrdlicka: $24,242.72
   C. Pre-1990 expenses: $18,500.00;

and

4. Postjudgment interest at 3.25% per annum.

Signed on June 8th, 1993, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

APPENDIX 5

UNITED STATES DISTRICT COURT		SOUTHERN DISTRICT OF TEXAS
W. STEVE SMITH, Trustee,	§	
Plaintiff,	§	Civil Action H-90-616
JANE BAILEY HAYTON, Intervenor,	§	Adversary 90-079
versus	§	Bankruptcy 87-03998-H5-7
P. T. EICHELBERGER, JR.,	§	
Defendant.	§	

ORDER
(Entered Jun. 11, 1993)

1. Eichelberger's motion for rehearing (#212) is denied.

2. Reba A. Eichelberger's application for attorney's fees (#198) is denied.

Signed on June 8th, 1993, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

APPENDIX 6

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JANE BAILEY HAYTON,	X	
Plaintiff,	X	
	X	CIVIL ACTION
V.	X	NO.
P.T. EICHELBERGER, JR., INDIV.	X	H-89-3336
PHILIP T. EICHELBERGER, JR.	X	
TRUSTEE, P. T. EICHELBERGER,	X	
JR. M.D.P.A. INTEGRATED	X	
PROFIT SHARING PLAN,	X	
	X	
Defendant.	X	

ORDER

Upon consideration of the Emergency Motion for Abstention and Remand of State Court Litigation filed by Jane Bailey Hayton, it is ORDERED that this action is remanded to the 257th Judicial District Court of Harris County, Texas, where the action originated.

SIGNED at Houston, Texas, on this 6th day of October, 1989.

/s/ David Hittner
DAVID HITTNER
United States District Judge

APPENDIX 7

UNITED STATES DISTRICT COURT — **SOUTHERN DISTRICT OF TEXAS**

JANE HAYTON,
Plaintiff,
versus
PHILIP T. EICHELBERGER, JR., *et al.*,
Defendants.

§ § § § § § § § §

CIVIL ACTION H-89-3336

(Entered Apr. 30, 1990)

FINAL JUDGMENT

The defendants' emergency motion for judicial notice is denied.

The defendants' motion for rehearing and for consolidation is denied.

Signed on April 24, 1990, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

APPENDIX 8

United States Bankruptcy Court

SOUTHERN District of TEXAS

In re P. T. Eichelberger, Jr.
AKA Philip T. Eichelberger, Jr.
P. T. Eichelberger, Jr., M.D., P.A.
P. T. Eichelberger, Jr., M.D.

Bankruptcy Case No. 87-03998-H5-7

Debtor* 462-32-8067
Social Security No. :
Employer Tax ID No.:

DISCHARGE OF DEBTOR

(Entered Nov. 19, 1990)

It appears that the person named above filed a petition commencing a case under title 11, United States Code on 4-23-87, that an order for relief was entered
date
under chapter 7, and that no complaint objecting to the discharge of the debtor was filed within the time fixed by the court [*or* that a complaint objecting to discharge of the debtor was filed and, after due notice and hearing, was not sustained].

IT IS ORDERED THAT:

1. The above-named debtor is released from all dischargeable debts.

**Set forth all names, including those names used by the debtor within the last 6 years. (Bankruptcy Rule* 1003).

2. Any judgment heretofore or hereafter obtained in any court other than this court is null and void as a determination of the personal liability of the debtor with respect to any of the following:

   (a) debts dischargeable under 11 U.S.C. § 523;

   (b) unless heretofore or hereafter determined by order of this court to be nondischargeable, debts alleged to be excepted from the discharge under clauses (2), (4) and (6) of 11 U.S.C. § 523(a);

   (c) debts determined by this court to be discharged.

3. All creditors whose debts are discharged by this order and all creditors whose judgments are declared null and void by paragraph 2 above are enjoined from instituting or continuing any action or employing any process or engaging in any act to collect such debts as personal liabilities of the above-named debtor.

11-19-90
Date

/s/ Karen K. Brown
Bankruptcy Judge

By /s/Ann Cook
Deputy Clerk

APPENDIX 9

UNITED STATES DISTRICT COURT — **SOUTHERN DISTRICT OF TEXAS**

W. STEVE SMITH,	§	
versus	§	
	§	
P. T. EICHELBERGER, JR.,	§	CIVIL ACTION
et al.,	§	H-90-616
versus	§	
	§	
W. STEVE SMITH,	§	

ORDER

(Entered Oct. 30, 1992)

Eichelberger's motion to disqualify Judge Lynn N. Hughes (#110) is denied.

Signed on October 28th, 1992, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

APPENDIX 10

UNITED STATES DISTRICT COURT	SOUTHERN DISTRICT OF TEXAS

W. STEVE SMITH, Plaintiff, *versus* P. T. EICHELBERGER, JR., *et al.*, Defendants and Cross-Plaintiffs, *versus* W. STEVE SMITH, Individually, Cross-Defendant.	§ § § § § § § § § § § § §	CIVIL ACTION H-90-616 ADVERSARY NO. 90-079 BANKRUPTCY NO. 87-03998-H5-7

ORDER

(Filed Sept. 19, 1991)

1. The intervention of Jane Bailey Eichelberger is allowed for the limited purpose of securing her interest upon termination of the Integrated Profit Sharing Plan.

2. Karen J. Cole, Senior Vice President and Trust officer of First City Bank, shall implement a report for distribution of the bankruptcy estate of Eichelberger including the Integrated Profit Sharing Plan. Cole may seek necessary approval from the Internal Revenue Service before the distribution.

3. On Tuesday, September 24, 1991, at 4:00 p.m., the court will hold a hearing on the appointment of a

receiver and an appraiser to determine the bankruptcy estate's monetary interest in Eichelberger's medical practice.

Signed on September 17, 1991, at Houston Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

APPENDIX 11

UNITED STATES DISTRICT COURT	SOUTHERN DISTRICT OF TEXAS

W. STEVE SMITH, Trustee, Plaintiff, *versus* P. T. EICHELBERGER, JR., *et al.*, Defendants and Cross-Plaintiffs, *versus* W. STEVE SMITH, Cross-Defendant.	§ § § § § § § § § § § § §	CIVIL ACTION H-90-616 ADVERSARY NO. 90-079 BANKRUPTCY NO. 87-03998-H5-7

ORDER

(Entered Dec. 21, 1992)

1. Karen Cole shall terminate the pension plan.
2. Dr. Eichelberger, as administrator of the plan, shall fully cooperate in executing the documents necessary to terminate the plan.

Signed on December 18, 1992, at 7:04 p.m., at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

APPENDIX 12

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

W. STEVE SMITH,	§	
PLAINTIFF,	§	
VS.	§	CASE NO. H-90-616 (CONSOLIDATED WITH ADVERSARY NO. 90-0079)
P.T. EICHELBERGER, JR., M.D., ET AL.,	§	
DEFENDANTS	§	
AND	§	
CROSS PLAINTIFFS	§	
VS.	§	
W. STEVE SMITH, INDIVIDUALLY,	§	
CROSS DEFENDANT.	§	

AGREED JUDGMENT APPROVING SETTLEMENT ON LESS THAN ALL CLAIMS

(Entered Dec. 28, 1992)

Came on for hearing the settlement and compromise of W. Steve Smith, bankruptcy trustee of the estate of P.T. Eichelberger, Jr., M.D. ("Trustee"); Jane Hayton, Intervenor ("Mrs. Hayton"); and Karen J. Cole and New First City, Texas, the court-appointed substitute trustee ("Plan Trustee") of the P.T. Eichelberger, Jr., M.D., P.A. ("P.A.") Integrated Profit Sharing Plan and Trust (the "Plan"), and due notice having been given as directed by this Court, it is ordered that:

1. Plan Trustee distribute, by December 31, 1992, the lump sum distributions representing their respective vested interests in the Plan in the amounts determined by the substitute Trustee by letter of June 24, 1992 to the following Plan participants: Faye New, Lois Chase and Dorothy Parkinson.

2. Substitute Trustee shall pay itself $7,500.00 from the cash assets of the Plan to cover its administrative fees and expenses.

3. Mrs. Hayton is allowed a pension benefit from the Plan in the amount of $130,686.00 plus interest at the rate of eight (8) percent from December 14, 1979 until fully paid.

4. Trustee relinquishes, but only to the extent hereinafter provided, P.T. Eichelberger's interest in the Plan, the amount of which was determined by Substitute Trustee by letter of June 24, 1992, which constitutes property of the estate, and Trustee relinquishes his right of surcharge to the properties addressed in paragraph 5 hereof.

5. Substitute Trustee shall distribute to Mrs. Hayton by December 31, 1992 the balance of the cash assets of the Plan, following distribution to Ms. New, Ms. Chase and Ms. Parkinson, any cash realized from the sale or liquidation of the American Capital Face Fund by the Substitute Trustee, the 50 shares of Exxon common stock, the 10 shares of IBM common stock and the 30 shares of Minnesota Mining & Manufacturing ("3M") common stock, the 400 shares of Kemper High Yield Fund account, all right, title and interest in any partnership or venture interests of the Plan, save and except the interest in 219 I.H. 10,

Ltd., which Plan Trustee shall distribute to Trustee (and which Trustee may abandon should he determine it has no value to the estate), and any and all other assets of or in the Plan, save and except the claims referenced in paragraph 6 hereof.

6. Substitute Trustee shall distribute, by December 31, 1992, to Trustee the Plan's claim or claims against P.A. for its contribution receivable by the Plan and/or P.T. Eichelberger, Jr. for the participant loan(s).

7. The balance of the claim of Mrs. Hayton, now credited but only to the extent of the value, as determined by Substitute Trustee, of the properties of paragraph 5 hereof, as the same is asserted against the P.A. or other property now or to become property of the bankruptcy estate of P. T. Eichelberger, shall be a general unsecured claim. This Court shall hear and determine on Jan 15, 1993 at 1:30 o'clock p.m. the liquidated amount of such claim for all purposes.

8. P. T. Eichelberger, Jr. shall execute any and all closing documents and instruments as and when directed by Substitute Trustee.

9. The parties to this Agreement shall execute such other documents as may be necessary to effectuate this agreement and judgment.

10. After distribution to the Plan beneficiaries, the substitute Trustee is hereby released from all duties and shall not be liable to any party for conduct within the capacity of an officer of the Court and Substitute Plan Trustee.

DONE at Houston, Texas, this 21st day of December , 1992 .

/s/ Lynn N. Hughes
LYNN N. HUGHES,
UNITED STATES
DISTRICT JUDGE

APPENDIX 13

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

/s/ Smith	§	
	§	CIVIL ACTION
versus	§	H-90-616
	§	
/s/ Eichelberger	§	

CONFERENCE MEMORANDUM

(Entered Aug 28, 1992) .

Appearances.

Counsel:	Representing:
/s/ Steven Smith	Ptf
/s/ Karen Cole	
/s/ Terry Lambert	
/s/ Janet Martenson	

Date: 8-26-92 *Reporter:* _____

At the conference, these rulings were made;

Pending motions:

P.T. Eichelberger shall attend all further hearings in person.

The trustee is (8) to take possession of the Exxon stock and (6) to disburse payments in full to the beneficiaries other than the illegible and those illegible under him.

APPENDIX 14

UNITED STATES DISTRICT COURT		SOUTHERN DISTRICT OF TEXAS
W. Steve Smith, Trustee,	§	
Plaintiff,	§	Civil Action H-90-616
Jane Bailey Hayton, Intervenor,	§	Adversary 90-079
versus	§	Bankruptcy 87-03998-H5-7
P. T. Eichelberger, Jr.,	§	
Defendant.	§	

The Trial Court's Response to
Eichelberger's Application for a Writ of Mandamus
(Filed May 5, 1993)

This court, through the bankruptcy court, abstained years ago from hearing Jane Hayton's claim against Philip Eichelberger under common law and their divorce decree for breach of fiduciary duty. That action was remanded to the 257th District Court of Texas, where it pends.

This court began hearing this week the claims by Hayton against Eichelberger under the Employee Retirement Income Security Act of 1974 for breach of his fiduciary duty as trustee and administrator of several formal ERISA plans.

Signed on May 5, 1993, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

APPENDIX 15

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

W. STEVE SMITH, Plaintiff,	§	
versus	§	CIVIL ACTION H-90-616
P.T. EICHELBERGER, JR., *ET AL.*, DEFENDANTS AND CROSS-PLAINTIFFS.	§	
VERSUS	§	
W. STEVE SMITH, Cross-Defendant.	§	

ORDER

(Entered Aug. 30, 1994)

1. The Trustee is authorized to pay $6,444.00 in fees and expenses, *pro rata,* to Richard H. Holdren and his firm, RH Medical Group. (#229)

2. The Trustee is authorized to pay these amounts in fees and expenses, *pro rata,* to its atorneys [sic]:

   A. $27,129.00 compensation from the first application;

   B. $884.68 expense reimbursement from the first application;

   C. $1,562.50 expense reimbursement preparing the first application;

   D. $135,721.70 compensation from the final application;

E. $6,988.54 expense reimbursement from the final application; and

F. $675.00 expense reimbursement preparing the final application.

Signed on August 26th, 1994, at Houston, Texas.

/s/ Lynn N. Hughes
LYNN N. HUGHES
United States
District Judge

APPENDIX 16

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

/s/ Smith	§	
versus	§	CIVIL ACTION H-90-616
	§	
/s/ Eichelberger	§	

ORDER SETTING HEARING

(Entered Jan. 24, 1995)

1. A hearing will be held before Judge Lynn N. Hughes on: pending motions

Feb 2 , 1994,

at 10:00

Courtroom 11-C, Eleventh Floor
United States Court House
515 Rusk Avenue
Houston, Texas 77002.

2. To insure full notice, each party who receives this notice shall immediately send a copy of it to every other party and affected non party whether they may have been sent one by the court. A party who fails to notify the others may be punished.

3. Each party shall appear by an attorney with (a) full knowledge of the case and (b) authority to bind the client.

Signed on Jan 20, 1994, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States
District Judge

APPENDIX 17

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	CASE NO.
P. T. EICHELBERGER, JR., M.D.	§	87-03998-H5-7
Debtor	§	
JANE BAILEY HAYTON	§	ADVERSARY
Plaintiff	§	NO.
v.	§	87-0831
P. T. EICHELBERGER, JR., M.D.	§	
Defendant	§	

ORDER AND MEMORANDUM OPINION GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

(Entered Jun. 13, 1989)

Candice S. Schiffman, Attorney for Plaintiff, Of Counsel: Fulbright & Jaworski, 1301 McKinney Street, Houston, Texas 77010

Reba A. Eichelberger, Attorney for Debtor, 4201 Garth Road, Suite 111, Baytown, Texas 77251-3111

The issues I must resolve comes before me by way of cross motions for summary judgment in this adversary proceeding to determine the dischargeability of a debt owed by the debtor and defendant, P.T. Eichelberger, Jr., M.D., to the plaintiff, Jane Bailey Hayton, his former spouse. Pursuant to 28 U.S.C. § 157(a) and the District

Court's Order of Reference, I have jurisdiction over this matter. The proceeding which plaintiff initiated to resolve the

* * *

Ms. Hayton initiated this adversary proceeding by filing her complaint to determine the dischargeability of the debt at issue and seeking damages for violating the terms of the divorce decree. On May 11, 1988, I recommended that the U.S. District Court partially abstain from the proceeding, retaining only the determination of the dischargeability of the debt owed under 11 U.S.C. § 523(a)(4). Based upon my report and recommendation, the District Court abstained from hearing the damage, accounting, injunction, and disbursement issues which underlie the dischargeability action.

II. DISCUSSION

In this dischargeability action, Jane Hayton does not seek to have me enforce the terms of the divorce decree. Nor does she seek a determination that debtor in his capacity as trustee and administrator of the Plan breached his fiduciary duties to her. Those issues are issues which, pursuant to the District Court's abstention order, must be decided in state court. Instead, Ms. Hayton seeks a determination that any damages suffered by her as a result of debtor's defalcation while serving in his individual capacity as plaintiff's trustee under the divorce decree are nondischargeable under 11 U.S.C. § 523(a)(4).

11 U.S.C. § 523(a)(4) provides that "[a] discharge under Section 727 [or] 1141 . . . of this Title does not discharge an individual debtor from any debt . . . for fraud

* * *

the debtor's misconduct. *In re Janikowski,* 60 B.R. 789, 784 (Bankr. N.D. Ill. 1986). It is no defense that the debtor derived no personal gain and defalcation may result through the debtor's negligence rather than his misconduct. *In re Cowley,* 35 B.R. 526, 529 (Bankr. D. Kan. 1983). Defalcation has been defined as broadly as the failure by a trustee to properly account for funds entrusted to him. *Corey Lumber Co. v. Bell,* 615 F.2d 370, 376 (5th Cir. 1980); *In re Borbidge,* 90 B.R. 728, 736 (Bankr. E.D. Pa. 1988). As a matter of law, I hold that debtor's failure to segregate plaintiff's funds and invest those funds according to plaintiff's instructions as well as debtor's termination of the plan and subsequent conversion to an integrated profit-sharing plan constitutes defalcation under Section 523(a)(4). Although debtor claims there is no portion of the funds within the plan that has been subject to his defalcation in the sense of depletion, the whole pattern of debtor's behavior evidences an intent to deprive plaintiff of her entire interest in the plan.

I, therefore, hold that no genuine issue of material fact exists with respect to the issue of debtor's fiduciary capacity under the divorce decree and debtor's defalcation while acting in his capacity as a fiduciary to Ms. Hayton. Any damages suffered by Ms. Hayton as a result of debtor's breach of his fiduciary obligations while serving as plaintiff's trustee under the divorce decree are held

nondischargeable under Section 523(a)(4). All relief requested by defendant is denied.

SIGNED: 6/8/89

/s/ Margaret Mahoney
UNITED STATES
BANKRUPTCY JUDGE

APPENDIX 18

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JANE BAILEY HAYTON Plaintiff	§	
v.	§	CIVIL ACTION
P.T. EICHELBERGER, JR., INDIV. PHILIP T. EICHELBERGER, JR. TRUSTEE, P.T. EICHELBERGER, JR. M.D.P.A. INTEGRATED PROFIT SHARING PLAN Defendant	§	NO. H-89-3336

EMERGENCY MOTION FOR ABSTENTION AND REMAND OF STATE COURT LITIGATION

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

JANE BAILEY HAYTON ("Plaintiff") respectfully files this Emergency Motion for Abstention and Remand of State Court Litigation, pursuant to 28 U.S.C. §§ 1334(c)(1), 1447(c) and 1452(b), and in support thereof would show the Court as follows:

Nature of Emergency

1. This Motion is filed as an "emergency" because the Plaintiff and the Defendant are scheduled to appear on Tuesday, October 10, 1989 before the state court on a hearing on the removed action. The Defendant has removed the state court action to this Court in a bad faith

attempt to further impede the Plaintiff from prosecuting her lawsuit. *Two Judges of this Court, Judges Sterling and Singleton, have previously entered separate orders in which they abstained from exercising jurisdiction over the Plaintiff's suit and ruled that the state court was better equipped to adjudicate the matter.* The Plaintiff has already been delayed for years by the Defendant's dilatory tactics. The Court must consider remand of this action to the state court immediately, in order to prevent further disruption of the state court action by the Defendant's bad faith tactics.

Background

2. On December 9, 1979, the 257th Judicial District Court of Harris County, Texas entered a Divorce Decree terminating the marriage of Jane Bailey Eichelberger and P. T. Eichelberger, Jr., M.D. (the "Defendant"). Among the assets of the community estate divided by the Divorce Decree was the Defendant's interest in the P. T. Eichelberger, Jr. M.D.P.A. Defined Benefit Investment Fund Pension Plan (the "Pension Plan").

4. The Divorce Decree ordered the Defendant to cause the Pension Plan trustee to transfer the sum of $130,686.00, representing the Plaintiff's one-half share of the Defendant's interest in the Pension Plan (the "Plaintiff's Interest"), into a segregated account to be invested upon instruction from the Plaintiff. Since 1979, the Defendant has steadfastly refused to comply with the directions in the Divorce Decree concerning segregation, accounting and investment of the Plaintiff's Interest in the Pension Fund.

4. In 1981, the Plaintiff returned to the state court to have the court force the Defendant to comply with the terms of the Divorce Decree. Early in 1982, the state court entered its Final Judgment, in which it found that it "has not jurisdiction over any alleged breach of fiduciary duties in connection with [the Plaintiff's] portion of the [Pension Plan]." Therefore, the state court dismissed the Plaintiff's enforcement action for want of jurisdiction by the state court.

5. Later in 1982, the Plaintiff brought suit against the Defendant in the United States District Court for the Southern District of Texas, seeking control and accounting of the Plaintiff's Interest in the Pension Plan awarded to her by the state court. This Court, Judge Sterling presiding, held that the Divorce Decree was a final judgment for purposes of Texas law, and was not preempted by the federal ERISA statute. The Court therefore abstained without ruling on the merits of the Plaintiff's Complaint because the state court was the proper forum for a dispute involving the enforcement of the Divorce Decree. *Eichelberger v. Eichelberger*, 584 F. Supp. 899 (S.D. Tex. 1984). A copy of the Court's opinion is attached to this Motion as Exhibit A.

6. The Plaintiff's motion for rehearing or new trial was not finally denied by this Court until June 24, 1986. On April 23, 1987, the Plaintiff was stayed from pursuing any further remedies against the Defendant when the Defendant filed a bankruptcy petition.

7. On July 30, 1987, the Plaintiff filed a Complaint in the Defendant's bankruptcy case to have the bankruptcy

court determine that the Plaintiff's claim for damages was not dischargeable in bankruptcy.

8. On May 4, 1988, the bankruptcy judge entered her recommendation for abstention, and on October 4, 1988, the District Court entered its Order abstaining from determining the amount of any debt owing by the Defendant to the Plaintiff as a result of the Defendant's alleged breach of his fiduciary duties to the Plaintiff under the Divorce Decree. True and correct copies of the Report and Recommendation of the bankruptcy judge and the Order of Abstention of the District Court are attached to this Motion as Exhibits B and C, respectively.

9. On June 13, 1989, the bankruptcy judge entered a Summary Judgment in favor of the Plaintiff and held that the Plaintiff's claim is not dischargeable. The Defendant appealed the bankruptcy judge's ruling. On September 28, 1989, this Court, Judge Hughes presiding, entered judgment affirming the bankruptcy judge's ruling (C.A. No. H-89-2315).

10. On August 28, 1989, the Plaintiff returned to the state court and filed her First Amended Motion to Enforce Judgment, seeking to have the court (a) amend the Divorce Decree to declare that the Divorce Decree is a Qualified Domestic Relations Order ("QDRO") as defined in the ERISA statute, (b) enforce the Divorce Decree provisions concerning the Plaintiff's Interest in the Pension Plan, and (c) determine the damages caused by the Defendant's breach of his fiduciary duties to the Plaintiff.

11. The Plaintiff later filed a Motion to Sever the issues regarding the determination of the QDRO from the

determination of damages, because the state court's ruling on the QRDO [sic] will expedite the payment of creditors in the Defendant's bankruptcy case. (Before the bankruptcy trustee can liquidate the Pension Plan assets to pay the Defendant's creditors, he must know how much of the Defendant's interest is properly payable to the Plaintiff under the Divorce Decree.)

12. The state court had scheduled a hearing on the Motion to Sever and other pre-trial matters for October 10, 1989.

13. On September 28, 1989, the Defendant filed his Petition for Removal, thereby removing the state court action to this Court. A true and correct copy of the Petition for Removal is attached to this Motion as Exhibit D. The Plaintiff did not receive a copy of this Petition until October 5, 1989.

Grounds for Abstention and Remand

14. Because the Defendant is the subject of a pending bankruptcy case in this district, the following statutes are applicable: 28 U.S.C. 1334(c) (regarding abstention) and 28 U.S.C. § 1452 (regarding remand). Upon information and belief, this removed action has not yet been referred to the bankruptcy judges under the Court's standing order of reference.

15. 28 U.S.C. § 1334(c)(1) provides that "[n]othing in this section prevents a district court in the interest of justice, or in the interest of comity with the state courts or respect for a State law, from abstaining from hearing a particular proceeding . . . related to a case under title 11."

16. 28 U.S.C. § 1452(b) provides that the district court may remand "on any equitable ground" a claim or cause of action that has been removed to this Court.

17. The Defendant states at paragraph 5 of the Application for Removal that the state court action should be removed to this Court because "[a]ll of Plaintiff's claims . . . are preempted by ERISA." There is no good faith basis for the Defendant to make such a statement in light of Judge Sterling's earlier ruling when the same parties and the same issues were before the Court. At that time, this Court stated that "[t]he Court- . . . concludes that ERISA has not preempted the community property laws of the State of Texas upon the facts of this case." The Court went on to say that

> [t]he relief demanded by the parties in this case would require the court to involve itself unnecessarily in this state court divorce proceeding, which is comprehensively and exclusively regulated by Texas laws. This the Court refuses to do. The proper forum for this dispute involving the enforcement of a valid judgment of divorce is Texas state court.

584 F. Supp. at 901.

18. The Plaintiff was later forced to prosecute her action in the bankruptcy court because of the Defendant's bankruptcy filing. When the matter came before the bankruptcy court, Bankruptcy Judge Mahoney said

> therefore, at the trial on this issue I will only determine whether the actions of Dr. Eichelberger constitute violations of 11 U.S.C. § 523(a)(4) but will not determine the damages assessable as a result of any conversion, breach

> of fiduciary duty, fraud or defalcation. *That will be left to a state court.* I will also not enjoin the debtor or require deliveries of accountings or disbursement of funds. *These actions will also be left for state court.*

Report and Recommendation Regarding Partial Abstention, Adv. Proc. No. 87-0831, May 10, 1988, Page 3 (Exhibit B to this Motion) (emphasis added).

19. This Court followed Judge Mahoney's recommendation and on September 21, 1988, Judge Singleton found that "it is appropriate to abstain from hearing the damage, accounting, injunction and disbursement issues underlying the dischargeability case." Order, MBH No. 88-32, September 21, 1988, page 1 (Exhibit C to this Motion).

20. The Defendant's ERISA preemption argument is frivolous. ERISA is indeed a federal statute, but the provision in question (29 U.S.C. § 1056(d)(3)) merely acknowledges that a state court can, in a domestic relations order, create or recognize an alternate payee's rights to receive a portion of the benefits of an ERISA-regulated pension plan. The ERISA provision discussing QDRO's does not require that a federal court enter the domestic relations order.

21. In Judge Mahoney's opinion holding the Plaintiff's claim to be nondischargeable (bankruptcy appeal H-89-2315), the court disposed of the Defendant's ERISA preemption argument once and for all:

> Judge Sterling's opinion holding that ERISA had not preempted the division of the spouses' community property interests in the Plan is, in my opinion dispositive of debtor's argument. See,

> *Eichelberger v. Eichelberger,* 584 F. Supp. at 900. Debtor chose not to appeal the decision of the District Court on the ERISA preemption issue, and I believe he is collaterally estopped to raise the issue here.

Order and Memorandum Opinion, Adv. Proc. No. 87-0381, June 13, 1989, Page 14.

22. The Defendant has removed the state court action to this Court solely as a dilatory measure to further impede the Plaintiff's prosecution of her lawsuit. If the Defendant's bad faith were not apparent from the facts recounted above, the Court should note that in 1988 the Court abstained from hearing the issues in this lawsuit at the request of *the Defendant,* not the Plaintiff. Clearly, the Defendant does not want any court to hear this suit, regardless of whether the forum is state or federal.

23. The Court should abstain and remand this matter to the state court on an expedited basis, so as not to delay the hearings already set by the state court for October 10, 1989. There is absolutely no reason for this action to be removed to this Court after the Court has already abstained at the Defendant's request.

24. Because of the Defendant's bad faith in removing this action, the Court should order the Defendant to reimburse the Plaintiff for her costs and reasonable attorney's fees incurred in prosecuting this Emergency Motion for Abstention.

Therefore, Jane Bailey Hayton prays that the Court enter an Order (a) abstaining from exercising jurisdiction over this state court action, (b) remanding the action to the state court, (c) granting her costs and reasonable

attorney's fees incurred in connection with this Motion, and (d) granting her such other and further relief to which she may show herself entitled.

DATED this 5th day of October, 1989.

Respectfully submitted,

By /s/ Stephen B. James
Stephen B. James
Dist. Ct. Admission
No. 2777
1301 McKinney Street
Houston, Texas 77010
(713) 651-5151
Attorney-in-Charge for
Jane Bailey Hayton

OF COUNSEL:
Candace S. Schiffman
FULBRIGHT & JAWORSKI
1301 McKinney Street
Houston, Texas 77010
(713) 651-5151

CERTIFICATE OF SERVICE

I certify that on the 6th day of September, 1989, a true and correct copy of the foregoing Emergency Motion for Abstention and Remand of State Court Litigation was served by hand delivery on the following:

Reba A. Eichelberger
Attorney at Law
4201 Garth Road, Suite 111
Baytown, Texas 77521-3111

/s/Stephen B. James
Stephen B. James

APPENDIX 19

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

W. STEVE SMITH, PLAINTIFF VS. P. T. EICHELBERGER, JR., M.D., ET AL., DEFENDANTS AND CROSS PLAINTIFFS VS. W. STEVE SMITH, INDIVIDUALLY, CROSS DEFENDANT	CASE NO. H-90-616 (CONSOLIDATED WITH ADVERSARY NO. 90-0079)

MOTION FOR DISQUALIFICATION OF JUDGE LYNN HUGHES

TO THE HONORABLE JUDGE LYNN HUGHES:

P. T. Eichelberger, Jr., M.D. et al, Defendants/Counter-Plaintiffs, in the above entitled and numbered lawsuit file their motion for your disqualification under 28 Section 455 (a)(b)(1) and in support of state the following:

1. It is with great fear and trepidation of your power as a Federal judge that Defendants/CounterPlaintiffs request that you disqualify yourself in all proceedings pertaining to all defendants-counterplaintiffs. Movants seek your disqualification for the following reasons:

A. The court's actions and orders in this case leave no reasonable question as to the lack of impartiality, and the presence of personal bias and prejudice concerning the Defendants/CounterPlaintiffs in this suit.

B. The court's personal knowledge of disputed evidentiary facts concerning the proceedings, including ex parte communications with opposing parties, and parties appointed by the court, has deprived Defendants/CounterPlaintiffs of due process and equal protection of the law.

2. Movants believe that the lack of impartiality, bias and prejudice of Dr. P. T. Eichelberger, Jr., stem in part from events that occurred during and after the internship of Reba A. Eichelberger with you in the 189the District Court, Harris County, Texas.

3. The Court appears to have decided, without giving Eichelberger the opportunity to have his day in court, that he is in the wrong, and has condemned him. The Court, in no uncertain terms has expressed bias and prejudice against persons who are forced to file for bankruptcy. The court has condoned the perjury and misrepresentations by W. Steve Smith.

4. The court has deprived defendants of the opportunity to present evidence and testimony, thereby depriving them of their constitutional rights of due process and equal protection. The court appointed Karen Cole as Trustee of the P. T. Eichelberger, Jr., M.D. P. A. Integrated Profit Sharing Plan based solely on the allegations of W. Steve Smith, a person known not to tell the truth.

The court held an ex parte conference with Karen Cole. There are no transcripts of the conference. Defendants/CounterPlaintiffs received notice of the ex parte conference by receipt of a copy of a letter sent to you with the report prepared by Karen Cole. A telephone call to Karen Cole revealed that R. A. Eichelberger was discussed at the meeting. A copy of the letter is attached to this letter as Exhibit 1.

5. Movants' attempt to take the deposition of Karen Cole concerning the report was quashed by you. A copy of the order is attached as Exhibit 2. The Court has now, based on ex parte conferences and Karen Cole's report, ordered the plan liquidated.

6. The Court's lack of impartiality is seen in the court's actions concerning Eichelberger's ex wife, Hayton. Because of the nearly identical issues presented in Hayton's state court proceeding with the identical parties and two lawsuits filed by W. Steve Smith, Movants removed the state court case to this court and requested consolidation of all lawsuits. You remanded Hayton's case to state court leaving the state court injunction intact that enjoined Movants from transferring, selling, assigning or alienating any assets or funds of the P. T. Eichelberger, Jr., M.D. P. A. Integrated Profit Sharing Plan. Without any concern that Movants are enjoined by the state Court, Smith has been permitted to harass Movants for two years by frivolous litigation for not violating the injunction. Hayton was permitted to intervene in the lawsuits.

Hayton's state court case asks the State Court to amend the 1979 divorce decree to contain the required

QUADRO language. The State Court has not made that decision. Karen Cole has decided the 1979 divorce decree is a QUADRO although Judge Emison in 1983 and Judge Sterling in 1985 and 1986 declined to do so.

7. On August 26, 1992, Smith filed an application to pay a 219 contribution. There was no designation of emergency or urgency. The application contained misrepresentations that Eichelberger had the right to rebut. Smith claimed that the first he knew about the 219 payment was August 25, 1992. On June 22, 1992, upon receipt of the letter from the 219 general partner, Eichelberger notified the general partner to contact Karen Cole, and sent copies of the letters to Karen Cole and W. Steve Smith. As a result of this Court's actions, Karen Cole has liquidated the Paine Webber account and Eichelberger, as administrator of the plan, has not been furnished any information as to the location of the funds. Copies of the letters are attached as Exhibit 3 and 4.

8. On August 26, 1992, this Court held an ex parte conference in chambers with W. Steve Smith, Janet Mortenson, Terry Lambert and Karen Cole. A review of the conference, for which no record was made, reveals more than a discussion of the 219 Capital Contribution occurred. A copy of the conference is attached as EX. 5.

On August 28, 1992, Movants received Smith's application to pay 219 capital contribution and immediately filed a response. Movants had received no notice of the hearing on August 26, 1992.

9. On October 15, 1992, Movants received a copy of a letter to you that denotes not only absolute disregard for Movants constitutional rights and rules of procedure

but a clear indication of expected preferential treatment and that such matters had been discussed at the conference. A copy of the letter is attached as EX. 6.

10. F.R.C.P. Rule 7(b)(1) provides that an application to the Court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing.

F.R.C.P. Rule 7(b)(2) provides: The Rules applicable to captions and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

Mortenson's letter, in clear violation of the rules constitutes an ex parte communication for an order that is clearly forbidden by the United States Constitution, Code of Judicial Conduct and the Federal Rules of Civil Procedure and is an apparent result from the ex parte conference on August 26, 1992.

10. Mortenson's letter, in addition to being an attempt to circumvent the rules, and the U. S. Constitution, requests this Court to award Smith Eichelberger's plan benefits in total disregard for the supreme law of the land as written by Congress in the enactment of ERISA, the Bankruptcy Code and the united States Supreme Court in *Patterson v. Shumate,* 112 S.Ct. 2242 (1992). "In our view, the plain language of the Bankruptcy Code and ERISA is our determinant. See *Toibb v. Radloff,* 11 S.Ct. 2197, 2199 (1991). Section 541(c)(2) provides the following exclusion from the otherwise broad definition of "property of the estate" contained in Section 541(a)(1) of the Code:

A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable non-bankruptcy law is enforceable in a case under this title. The natural reading of the provision entitles a debtor to exclude from property of the estate any interest in a plan or trust that contains a transfer restriction enforceable under any relevant

* * *

Section 206(d)(1) states that each pension plan shall provide that benefits provided under the plan may not be assigned or alienated. Paragraph 6.10 of the P. T. Eichelberger, Jr., M.D. P. A. Integrated Profit Sharing Plan contains that provision. A copy of Paragraph 6.10 of the Plan is attached as EX. 7. In *Guidry v. Sheet Metal Workers Pension Fund,* 110 S. Ct. 680 (1990), the court declined to recognize any exceptions to ERISA' [sic] anti-alienation provision outside the bankruptcy context. In *Patterson supra,* the Court reemphasized its ruling in *Guidry,* stating, "Declining to recognize any exceptions to that provision within the bankruptcy context minimizes the possibility that creditors will engage in strategic manipulation of the bankruptcy laws in order to gain access to otherwise inaccessible funds".

12. Smith and Mortenson have no standing to bring the lawsuits, adversary proceeding No. 90-079 and Complaint No. 90-616 because a bankruptcy trustee has authority to deal only with estate properties. P. T. Eichelberger, Jr.,'s interest in his pension plan benefits never were the property of his bankruptcy estate. The bankruptcy court is a court of limited jurisdiction, The bankruptcy court had no jurisdiction over non bankruptcy estate properties. 11 U.S.C. Section 541 and ERISA Section 206(d)(1) was the law in effect on April 23, 1987,

the date P. T. Eichelberger, Jr., M.D. individually filed for bankruptcy.

13. The court is requested to take judicial notice of the records and orders of Case No. 90-616 consolidated with adversary proceeding No. 90-079 as proof conclusive of the court's lack of impartiality. The claims, if any, alleged by Smith (without impartiality. The claims, if any, alleged by Smith (without standing) are clearly barred by the Statute of Limitations and the Doctrine of Res Judicata and Collateral Estoppel, as stated in Eichelberger's motion for summary judgment pending in the case.

14. Pleadings, Motions, Orders, in Cause No. 90-616, and the exhibits and affidavit documenting ex parte conferences and attached to this motion are ample proof that the provisions under 28 U.S.C. 455 for disqualification are present in this case.

Defendants/CounterPlaintiffs respectfully request the judge disqualify himself under 28 U.S.C. Section 455.

REBA A. EICHELBERGER
ATTORNEY AT LAW
4201 GARTH ROAD, SUITE 111
BAYTOWN, TX. 77521
(713) 428-1242
STATE BAR NO. 06493000
FEDERAL ADMISSIONS NO. 2796
/s/ Reba A. Eichelberger
REBA A. EICHELBERGER

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was provided to counsel of record by U.S. Mail, first class, certified, return receipt requested, to-wit:

Date: October 16, 1992

Ms. Janet Mortenson
#P 401 102 454
Mr. Jefferey Gillespie
#P 401 102 455

/s/ Reba A. Eichelberger
REBA A. EICHELBERGER

APPENDIX 20

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

W. STEVE SMITH, Plaintiff JANE BAILEY EICHELBERGER, Intervenor-Plaintiff vs. P. T. EICHELBERGER, JR., M.D., Defendant P. T. EICHELBERGER, JR., M.D. PROFESSIONAL ASSOCIATION Defendant	CIVIL NO. 90-CV-616 Houston, Texas December 8, 1992 4:30 p.m.

HEARING

(Filed Jan. 7, 1993)

BEFORE THE HONORABLE LYNN N. HUGHES
UNITED STATES DISTRICT JUDGE

Court Reporter: WILLA J. FARIS, R.P.R.
Official Court Reporter
United States District Court
515 Rusk, Suite 8016
Houston, Texas 77002
(713) 250-5034

Proceedings reported by stenotype, transcript produced by computer-aided transcription.

* * *

[p. 18] before Dr. Eichelberger's, because there is a breach of fiduciary claim outstanding, and whereby a breach of fiduciary is liable to the plan for the losses to the plan. So to that extent we would like some priority of the payment of the benefits to Mrs. Hayton.

THE COURT: Aren't we doing that?

MS. CAVAZOS: Well, if you are doing that it's great, and thank you, your Honor.

THE COURT: I mean isn't that the plan?

MS. CAVAZOS: Well, I think you said the plan was to pay the both of them, I would like for her to have some priority.

THE COURT: Well, it's to pay her, and then Dr. Eichelberger is only going to get the residuum, if any.

MR. SMITH: I didn't hear what you said, your Honor, I'm sorry.

THE COURT: Doctor Eichelberger is only going to get the left-overs.

MS. CAVAZOS: Thank you, your Honor.

MR. SMITH: I don't know if I agree with that. Give me a second.

THE COURT: You certainly want him to get the left-overs after you're finished.

MR. SMITH: Oh, yes, I'm sorry, yes, if there are any after the estate finishes with him.

* * *

[p. 23] I'll have to go back to the state court to determine that.

But, your Honor, the distinction that I'm trying to draw is Doctor Eichelberger was ordered to do something and he didn't do it, and that creates a claim. I don't know how we make this leap of faith over into the fact that he didn't do it that gives her standing that some other creditor that was promised, "I'll pay you back" wasn't paid back.

THE COURT: The distinction is that Doctor Eichelberger has various capacities, and it's not always clear what capacity, I may be ordering him to do things in, and it's not always clear the capacities in which the state court was ordering him in doing things! The only capacity in which he could hold as trustee a segregated portion of the corpus of the pension plan was that as trustee of the pension plan, having the body of Doctor Eichelberger before the Court, having no objection that I found to his being ordered to do things in any capacity that he had, after all he's president of the professional corporation, he's himself, he's a doctor, he's trustee. I didn't see any place he explained to the state court that, now, wait a minute I'm only here in my capacity as estranged spouse and not my capacity as president of the corporation and all these other things, to the extent necessary to effectuate the judgment of the court.

Perhaps it would have been better had third party action been filed against the plan or against the professional [p. 24] association to make sure that capacity was expressed, but Miss Hayton had a judgment that she was

a participant, it was binding on the only actor connected to the trust, and she was completely without means to accomplish anything to distinguish herself from your other creditors other than what she did, which was get a final non-appealable judgment that she had a property interest in it.

In retrospect we can think of other things that could have been done, but I can't say what she did was in any way negligent.

Now she also has this claim, but again I don't see anything that would keep her from pressing a claim that she is entitled to a non-dischargeable personal claim in the full amount of whatever interest plus any accumulation that should have occurred against him individually, while at the same time claiming to be a participant because she may lose one or the other.

And we've all pleaded in the alternative, and so she's got one claim, she can't have it both ways, but she can certainly claim it both ways and the one that works best, and after all you can take the same claim, state it 12 ways, and lose on all 12, so it seems to me that if I conclude that I can pass the property interest that she was adjudicated in '79 to her then that wipes out her claim, a non-dischargeable claim against him individually, except to the extent for damages to [p. 25] breach of fiduciary duty, for the res.

MR. SMITH: I would think she would have a claim remaining for whatever her claim was determined to be to the extent it wasn't satisfied.

THE COURT: Right, but to the extent she gets money out of the plan it extinguishes this non-dischargeable debt, and you're not going to worry about that because it goes off and follows the debtor. So I see them as parallel rather than inconsistent.

MRS. EICHELBERGER: Your Honor –

MR. SMITH: I think she still has a claim for that in the estate, unless you're again drawing a distinction that her claim against him non-dischargeable is only in her capacity as trustee.

See that's where we kind of start meshing again, the non-dischargeable claim him as the debtor, and the trustee, Eichelberger trustee was not the debtor, so a court has found that he did something wearing that hat, the trustee hat.

THE COURT: So you're saying that if she were to come up with a $200,000 judgment for breach of fiduciary duty –

MR. SMITH: I think she's got a pretty good leg to stand on so far as asserting a claim –

THE COURT: She could then factor that in as a numerator.

MR. SMITH: Right!

[p. 26] MRS. EICHELBERGER: Well, your Honor, now that you all have all to me given the appearance of impartiality, lack of impartiality, may I address two issues and correct the record?

THE COURT: No, no, no, no.

You had something?

MR. GILLESPIE: I'll let her finish, your honor.

THE COURT: I'm not sure she's ever through.

MR. GILLESPIE: What I was going to say, I disagree with Mr. Smith's last statement, and that is that it's either or. I think we have our rights in the pension plan, no ifs, ands, or buts. Now my best statement is Miss Cole is the trustee, and she was asked to look at it, and her recommendation – we're a participant, Jane Hayton should be paid. I think that's her report to this court in her capacity as trustee of the plan.

THE COURT: All right. Are you representing Miss Hayton will abandon any claim in excess of any amount she receives from the plan?

MR. GILLESPIE: No, my opinion though is that I had the right to continue beyond the assets, whatever crumbs fall off the table are available to me, Jane Hayton, left over from the pension plan. I have a claim in state court which is a non-dischargeable debt, and I have the right to try to collect it if I can, and to that extent –

THE COURT: But that's going to be the difference

* * *

[p. 28] MR. GILLESPIE: What am I going to do?

THE COURT: In the real world if Miss Hayton has disbursed her interest in the plan, what claims will be pursued in the bankruptcy estate?

MR. GILLESPIE: I don't think any of the bankruptcy estate. All I have is a judgment that's non-dischargeable, does that go back to the bankruptcy trustee? I think I have the right to go see if he has any assets in P.A.Two, it is not part of the bankruptcy estate –

MRS. EICHELBERGER: If you get a judgment.

THE COURT: No, if it's liquidated you would have, I thought I agreed or followed, maybe both, that if you have a non-dischargeable debt, and you are able to inflate that by liquidating a breach of duty claim, then you get a larger, your claims in bankruptcy are larger.

MR. GILLESPIE: Right.

THE COURT: And I think it would be also true that you could then follow the debtor post petition.

MR. GILLESPIE: Right.

MR. SMITH: Judge, he could file the proof of claim and if there was no objection to that it would be allowed and entitled to participate, but I think the problem is right now –

MR. GILLESPIE: We have filed a proof of claim.

MR. SMITH: Well, we have an objection. I don't think that there is a liquid sum that's been determined, is there?

[p. 29] THE COURT: No.

MR. SMITH: I think that that's before they go chasing Doctor Eichelberger to seize assets.

MR. GILLESPIE: I agree with the general consensus, that I get my money whatever crumbs off the

table fall to me, then the difference is my claim against him.

THE COURT: But if you have a non-dischargeable claim you could then not claim among the general creditors –

MR. SMITH: You could do both.

THE COURT: I know, I'm making a suggestion.

You could pursue the post petition debtor.

MR. GILLESPIE: That would be my sense.

THE COURT: And leave the other creditors alone, making it possible for Mr. Smith to know what the size of the pile is, and to be less offended that some of the assets are evading the state of the bankrupt.

MR. GILLESPIE: In fact I think we can agree to that. I think we can agree that any judgment we get will be only as to things outside the purview of Mr. Smith.

THE COURT: All right.

MR. [sic] EICHELBERGER: Your Honor, I would object to all of this.

THE COURT: Why are you – tell me about this objection.

MRS. EICHELBERGER: I'm objecting, your Honor, to a [p. 30] total lack of consideration or evidence that Doctor Eichelberger is in fact guilty of all of these things. We are in fact dissecting his cadaver and he hasn't died yet.

THE COURT: He's died three times, as trustee and as president of Professional Association, and then as a debtor.

MRS. EICHELBERGER: What?

THE COURT: We've got all these estates of his lying around.

MRS. EICHELBERGER: Your Honor –

THE COURT: That's the whole nature of bankruptcy, you dissect the cadaver –

MRS. EICHELBERGER: But we should have –

THE COURT: And we feed it to the vultures as they're entitled.

MR. [sic] EICHELBERGER: And if they're not entitled –

THE COURT: He filed bankruptcy.

MRS. EICHELBERGER: That's right, your Honor, he did file bankruptcy, and there are certain rules and procedures that exactly says what you should do.

THE COURT: Miss Eichelberger, there is an action pending in state court to liquidate the claim against him for breach of his fiduciary duty, so why are you objecting to us discussing the pendency of that claim in this action?

MRS. EICHELBERGER: Because it seems, your Honor, and I'm just going to tell you, it appears to me that you are taking [p. 31] the side of one of the parties. I feel that there were ex parte communications, and that those are violations of –

THE COURT: Wait, explain that to me.

MRS. EICHELBERGER: Okay, I will. The Fifth Circuit in a court concerning Judge Nolan said that ex parte communications deprive the person –

THE COURT: Don't tell me about the Fifth Circuit, tell me about the ex parte communications.

MRS. EICHELBERGER: The one you had, your Honor, when Steve Smith and Janet Mortenson and Terry Lambert and Karen Cole met in your chambers, that was the ex parte, and then you entered a judgment or ruling that Doctor Eichelberger must appear at all the hearings. Well, there was obviously something discussed at that hearing for you to make that decision.

And, your Honor, we object to the ex parte, we believe that we are entitled to be here to hear what you have to say, but we also believe that the law provides that you be impartial and that you not sit there and just say, "Well, here's what you ought to do, well, you could get this or you could get this, well, why, could you file both claims?"

Your Honor, I think the whole issue before this Court is – and I'm not asking you to redo anything because of Shumate versus Patterson in regards to Miss Hayton. The law is very clear that if in fact all of this rhetoric that we have had about Doctor Eichelberger holding this money in constructive [p. 32] trust for Jane Hayton, it is not part of the bankruptcy estates, it is free and clear to her, it is not something that Mr. Smith can take as part of his attorney's fees, it's simply not part of the bankruptcy estate, and that's the whole issue.

I think that to sit here and discuss whether she should seek a greater amount from Doctor Eichelberger by not taking her part out of the pension plan is totally erroneous law.

Your Honor, we made a suggestion, and I believe this is the suggestion pursuant to the pension plan and ERISA, and here's what it was: That all of the plan participants receive their money, because they are in pay status and they have completed all the requirements for the benefits to be distributed, including Doctor Eichelberger and the alternate payee, Jane Hayton.

So the Court had said well – I mean Mr. Smith has alleged that the P.A. owes a contribution to the pension plan. Then Mr. Smith claims he owns the P. A. one hundred percent.

So Miss Hayton shouldn't have the accounts receivable, that belongs to Mr. Smith. There are – there is land in the pension plan that requires capital contributions, the Court is concerned about attorney's fees being, having to be paid. Each time that we have to make a capital distribution a number of lawyers have to come to the court and get permission [p. 33] to pay it, that's what Miss Cole has had to do.

So, your Honor, if there is enough money to pay a percentage of Jane Hayton's part, she's entitled to it, because that's not part of the bankruptcy estate.

MR. SMITH: Your Honor.

THE COURT: Did I ever meet with you?

MR. SMITH: Yes, sir, it was in regard to the status, we requested a status conference meeting you advised us that we send a report of that to . . .

That was on another cash call that we had to make and Miss Cole was asking permission to do that.

MRS. EICHELBERGER: And there is another one.

THE COURT: Did we meet or did I call you?

MRS. EICHELBERGER: You met, your Honor.

THE COURT: I know I met with Miss Cole, but I didn't think the lawyers were there.

MR. SMITH: Yes. sir.

THE COURT: Okay, I just didn't remember.

MR. SMITH: Your Honor, this is a terrible time to ask this of you, but I came to fill in for Miss Mortenson until she got out of court, and I have a plane out of Intercontinental at 6:59, is there any way I can be excused, please?

THE COURT: And leave me in the tender mercies of Miss Mortenson?

MR. SMITH: Yes, sir.

APPENDIX 21

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

W. STEVE SMITH Plaintiff JANE BAILEY EICHELBERGER Intervenor-plaintiff -vs- P.T. EICHELBERGER, JR., MD. Defendant P.T. EICHELBERGER, JR. MD., PROFESSIONAL ASSOCIATION Defendant P.T. EICHELBERGER, JR., MD. Counter-claimant P.T. EICHELBERGER, JR., MD. PROFESSIONAL ASSOCIATION Counter-claimant -vs- W. STEVE SMITH Counter-defendant P.T. EICHELBERGER, JR., MD. AS TRUSTEE AND ADMINISTRATOR OF THE P.T. EICHELBERGER, JR., MD.INTEGRATED PROFIT SHARING PLAN, JR., TRUSTEE Defendant	No. 90-CV-616 HOUSTON, TEXAS JANUARY 15, 1993 1:30P.M. (Filed Aug. 19, 1993)

P.T. EICHELBERGER, JR., MD. AS TRUSTEE AND ADMINISTRATOR OF THE P.T. EICHELBERGER, JR., MD. INTEGRATED PROFIT SHARING PLAN, JR., TRUSTEE
Intervenor-defendant

W. STEVE SMITH
Counter-defendant.

* * *

[p. 5] think that objections must have been filed is that its scheduling order on the objections was entered, but the objection itself doesn't seem to be in the file.

Mr. Smith succeeded Eichelberger as representative of the estate once he became trustee. And Mr. Smith is willing to accept the first amended proof of claim, in other words, to withdraw the objection, if any, that had been filed by Eichelberger as debtor in possession.

Also, prior to Mr. Smith's appointment, Mrs. Hayton filed a complaint to determine dischargability [sic] of debt. Judge Mahoney found that any defulcation by Eichelberger, any breach of the fiduciary duty would give rise to damages, which would be a nondischargeable debt.

The trustee has entered an agreement with Mrs. Hayton to allow her first amended proof of claim as filed less deductions for the amount already paid to her under this court's order. So between the trustee and Mrs. Hayton there are no disputes. The amount of this –

THE COURT: I'm sorry, you lost me on Judge Mahoney.

MS. MORTENSON: Judge Mahoney in ruling on the complaint to determine dischargability [sic] found that the determination of whether Eichelberger had breached his fiduciary duty has to be tried. The amount of damages had to be tried. But any damages from – arising from a breach of fiduciary duty were a non-dischargable [sic] debt.

[p. 6] THE COURT: I thought I remanded the question of whether his duty had been breached and the amount of damages to state court.

MS. MORTENSON: That's right.

THE COURT: I didn't?

MS. EICHELBERGER: Yes, you did, Your Honor.

THE COURT: And I agree with Judge Mahoney that the judgment that results from that, assuming it's properly done, Mr. Gillespie, that's a safe assumption, that that would be a nondischargable debt.

MS. MORTENSON: That's right, Your Honor.

So on the claim that there's no dispute between the claimant and Mrs. Hayton –

THE COURT: She has two claims. She has a claim for her benefit of the judgment or her benefit under the plan and the claim for her breach of fiduciary – or his breach of fiduciary duty.

MS. MORTENSON: Yes.

THE COURT: All right. How much is the claim to the proceeds from the deceased plan; is that the whole 500 – whatever number you gave me?

MS. MORTENSON: That was the amount of the claim she filed against the bankruptcy estate.

THE COURT: And what you and Mr. Smith have agreed is that that's the amount of damages from the breach of * * *

[p. 13] nondischargeable debt.

THE COURT: The place, to argue that it's going – should be a nondischargeable debt is by getting a proper judgment in his favor in state court.

MS. EICHELBERGER: Yes. Your Honor.

THE COURT: There's no question that if Mr. Gillespie ended up with the true common law breach of fiduciary duty judgment, it's not dischargable [sic]. It doesn't take all that much to figure that out. So his interest is protected by my remand of the issue of damages to the state court.

MS. EICHELBERGER: Okay!

THE COURT: And for the purposes of the estate, they're willing to allow the claim up to that much. But they're not doing anything discharging – she's not stipulating nondischargability [sic]. Miss Hayton to have a nondischargeable claim against Dr. Eichelberger must prevail in the state court.

MS. EICHELBERGER: Yes, Your Honor. I understood that, but –

THE COURT: So he has no interest in the amount of the claim that the trustee concedes in this proceeding since it will not go against him, but only go against the insolvent estate.

MS. EICHELBERGER: Except, Your Honor, that if you

* * *

APPENDIX 22

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

W. STEVE SMITH JANE BAILEY EICHELBERGER	}	CA H 90-616 Houston, Texas
vs.	}	April 15, 1993
P.T. EICHELBERGER, et al	}	9:45 p.m.

HEARING
Before the Honorable Lynn N. Hughes

(Filed Apr. 20, 1993)

APPEARANCES:

Mr. W. Steve Smith
WOODARD, HALL & PRIMM
7000 Texas Commerce Tower
Houston, Texas 77002

Mr. Peter Lewis
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1445 Ross Avenue, Suite 3200
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Ms. Reba Eichelberger
4301 Garth Road, Suite 303
Baytown, Texas 77521

Court Reporter:

Mrs. Joyce K. Schaefer
Official Court Reporter
515 Rusk, Room 8102
Houston, Texas 77002

Proceedings reported by stenography, transcript produced by computer-aided transcription

* * *

[p. 40] MS. EICHELBERGER: I am sure that I can get a jury trial on a breach of fiduciary duty of – let me think about that. Just a moment, sir.

Yes, I believe so. I believe intent and breach of fiduciary duty as it is listed in this case, I most certainly am entitled to a jury trial. I am also entitled to a jury trial on the issue of –

THE COURT: I don't want to know about issues I didn't ask you about.

MS. EICHELBERGER: I am sorry.

THE COURT: I don't want to know do you have one for personal injury. I understand that. That wasn't the question. The question is under ERISA.

MS. EICHELBERGER: I believe if you are suing the person as an administrator, not seeking to recover from the plan, yes. I am positive you do.

THE COURT: On that point, you may submit a memorandum because the trial is set as a bench trial May 4th, 1993 to establish the conduct of Dr. Eichelberger in relation to his duties individually when he was acting as the trustee or administrator of the ERISA plan. It will not,

I don't think – I don't want to address – it seems to me the divorce action thing has been mooted since I have taken –

MR. GILLESPIE: That is my hope. That is my hope.

THE COURT: I've taken the money and I have given it

* * *

APPENDIX 23

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	>	
P.T. EICHELBERGER, JR., M.D., DEBTOR.	>	CASE NO. 87-03998-H5-7
W. STEVE SMITH	>	
PLAINTIFF,	>	
VS.	>	CASE NO. H-90-616 (CONSOLIDATED WITH ADVERSARY NO. 90-0079)
P.T. EICHELBERGER, JR., M.D., ET AL.,	>	
DEFENDANTS AND CROSS PLAINTIFFS	>	
VS.	>	
W. STEVE SMITH, INDIVIDUALLY	>	
CROSS DEFENDANT.	>	

HAYTON'S CLAIM FOR RELIEF
(Filed Apr. 23, 1993)

COMES NOW, Jane Hayton, and files this Claim for Relief and in support thereof would show the Court as follows:

I.

Jane Hayton seeks to complete adjudication of her claims under the Employee Retirement Income Security Act ("ERISA") of 1974, as amended, 29 U.S.C. 1001 **et seq.**

Ms. Hayton proceeds under the following provisions of ERISA:

a. 29 U.S.C. 1132(a)(1)(B) – to recover benefits, enforce her rights and clarify her rights to future payment under the terms of the plan.

b. 29 U.S.C. 1109 – to make Dr. Eichelberger personally liable for the remainder of her pension benefit, which loss was caused by Dr. Eichelberger's breach of fiduciary duty.

c. 29 U.S.C. 1140 – to redress Dr. Eichelberger's interference with Ms. Hayton's rights under the plan.

d. 29 U.S.C. 1132(g)(1) – to recover reasonable attorney fees and costs because Ms. Hayton has prevailed in her claim for the payment of pension benefits. **See Ironworkers Local 272 vs. Bowen,** 624 F.2d 1255 (5th Cir. 1980).

II.

ERISA claims are equitable and no right to a jury trial exists under ERISA. The following cases in the 5th Circuit support this proposition:

a. **Crews vs. Central States, Southeast and Southwest Pension Fund,** 788 F.2d 332, 338 (5th Cir. 1986).

b. **Calamia vs. Spivey,** 632 F.2d 1235 (5th Cir. 1980).

c. **Goodman vs. S & A Restaurant Corp.,** 756 F. Supp. 966, 971 (S.D. Miss. 1990).

d. **Fonner vs. Georgia-Pacific Corp.,**747 F. Supp. 340 (M.D. La. 1990).

e. **Juckett vs. Beecham Home Improvement Products, Inc,** 684 F. Supp. 448, 452 (N.D. Tex. 1988).

f. **Sublett v. Premier Bancorp Self-Funded Medical Plan,** 683 F. Supp. 153, 155 (M.D. La. 1988).

WHEREFORE, PREMISES CONSIDERED, Jane Hayton prays that this Court grant the Relief requested including attorney's fees, interest and cost and for such other and further relief as she may show herself justly entitled.

RESPECTFULLY SUBMITTED,

/s/ Jeffrey W. Gillespie
GILLESPIE & GILLESPIE
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Attorney for Jane Hayton

APPENDIX 24

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

W. STEVE SMITH,	X	
PLAINTIFF	X	
	X	**NO. 87-03998 H-5-7**
VS.	X	**CASE NO. H-90-616**
P. T. EICHELBERGER, JR., M.D., ET AL.	X	**(CONSOLIDATED**
	X	**WITH ADVERSARY**
	X	**NO. 90-0079)**
DEFENDANTS AND CROSS PLAINTIFFS	X	
	X	
VS.	X	
	X	
W. STEVE SMITH, INDIVIDUALLY,	X	
	X	
CROSS DEFENDANT	X	
	X	

1. ANSWER TO HAYTON'S CLAIM FOR RELIEF
2. MOTION TO DISMISS FOR WANT OF JURISDICTION AND UNDER FRCP Rule 12(b)(6)

(Filed Apr. 29, 1993)

TO THE HONORABLE JUDGE OF SAID COURT:

P. T. Eichelberger, Jr., M.D., individually (hereinafter "Eichelberger"); P. T. Eichelberger, Jr., M.D.P.A., sponsor of the P. T. Eichelberger, Jr., M.D.P.A. Integrated Profit Sharing Plan (hereinafter "Professional Association"); P. T. Eichelberger, Jr., M.D., trustee and administrator of the P. T. Eichelberger, Jr., M.D.P.A. Integrated Profit Sharing Plan (hereinafter "Eichelberger Trustee/Administrator"); and the P. T. Eichelberger, Jr., M.D.P.A. Integrated Profit

Sharing Plan (hereinafter "Plan") Defendants/Counter-Plaintiffs (hereinafter collectively "Defendants") files this answer to Hayton's claim for relief stating as follows:

I.

JURISDICTION

1. The Court divested itself of jurisdiction over Hayton's claims against Defendants by granting Hayton's emergency order for remand on October 6, 1989. Hayton's petition and a copy of the remand order are attached as Exhibits 1 and 2.

2. Hayton's actions in seeking to have this Court exercise jurisdiction over a case remanded at her request constitutes violations of FRCP Rule 11 and is impermissible forum shopping.

3. Hayton's actions are an attempt to collaterally attack the final, unappealable remand order.

4. Defendants deny each and every claim and demand strict proof thereof in accordance with the U.S. Constitution and the law.

5. Defendants adopt and incorporate their motions and objections to intervention, claims of Hayton, objections to bench trial on May 4, 1993, Memorandum of Law in support of a jury trial filed on April 20, 1993, and objections and supplement filed April 26, 1993, herein as though fully stated.

6. Defendants deny that Hayton has standing to proceed under 29 USC 1132(a)(1)(B), 29 USC 1109, 29 USC 1140 and 29 USC 1132(g)(1).

29 USC 1132(a)(1)(B) provides a plan participant can sue to recover benefits, enforce and clarify rights to future payment under the plan.

First, Hayton is not a plan participant. She is, by law, an alternate payee.

Second, by court order, the Court appointed Karen Cole, Trustee, and turned over all plan benefits and funds to her and subsequently terminated the plan.

Third, Hayton settled her claims under the plan, (taking all remaining plan funds and assets including those belonging to P. T. Eichelberger, Jr., M.D.) with W. Steve Smith for the estate of P. T. Eichelberger, Jr., P. T. Eichelberger, Jr., M.D.P.A., sponsor of the Plan, and the P. T. Eichelberger, Jr., M.D.P.A. Integrated Profit Sharing Plan.

29 USC 1109(5) provides for restoration of losses to a plan for breach of fiduciary duty to the plan.

Eichelberger Trustee/Administrator denies he breached any fiduciary duty to the Plan, that Hayton has standing to assert any claims on behalf of the Plan. At all times Hayton sought to have Eichelberger Trustee/Administrator to violate ERISA and the Plan contract by enforcement of provisions of a divorce decree totally preempted by ERISA.

Lastly, by Court order there is no longer a Plan.

(c) 29 USC 1140 – Eichelberger Trustee/Administrator and individually denies that Hayton has any standing or claims against Eichelberger individually for her rights under the Plan.

Under the divorce decree provisions, Hayton is an alternate payee, and as such, receives her benefits derivative from Eichelberger the Plan participant. Eichelberger never received his Plan benefits. Trustee Smith and Hayton converted Eichelberger's benefits in violation of well established law pertaining to ERISA. Their agreement constitutes as an accord and satisfaction transaction between the Eichelberger bankruptcy estate, P.A. I and the Plan.

29 USC 1132(g)(1) – Eichelberger Trustee/Administrator denies that Hayton prevailed on any claim for payment of pension benefits. Hayton's claims and adversary proceeding for nondischargeability were against Eichelberger individually. The claims are preempted by ERISA. By agreement, Trustee Smith on behalf of the estate gave Hayton P. T. Eichelberger, Jr., M.D.'s pension benefits, in violation of the law.

Hayton never filed a complaint to determine dischargeability of a debt against Eichelberger Trustee/Administrator. The time to file claims or objections to discharge of a debt have long since passed.

Hayton filed four lawsuits prematurely. The conditions precedent to her entitlement as an alternate payee. The Plan benefits became available to Eichelberger as a Plan participant if he reached normal retirement age, retired or terminated employment. Eichelberger became eligible to receive benefits in 1989.

A temporary injunction obtained by Hayton in 1989 and later by Trustee Smith and district court orders prevented Eichelberger from ever receiving his benefits.

II.

Alternatively, Hayton's claims are barred by res judicata, collateral estoppel, judicial estoppel, limitations, waiver and preemption.

III.

MOTION TO DISMISS FOR WANT OF JURISDICTION UNDER RULE 12(b)(6)

P. T. Eichelberger, Jr., M.D., individually; P. T. Eichelberger, Jr., M.D.P.A., sponsor of the P. T. Eichelberger, Jr., M.D.P.A. Integrated Profit Sharing Plan; P. T. Eichelberger, Jr., M.D., trustee and administrator of the P. T. Eichelberger, Jr., M.D.P.A. Integrated Profit Sharing Plan; and the P. T. Eichelberger, Jr., M.D.P.A. Integrated Profit Sharing Plan file this Motion to Dismiss for Want of Jurisdiction under FRCP Rule 12(b)(6) and state as follows:

1. DISMISSAL FOR WANT OF JURISDICTION. The Court divested itself of jurisdiction when it granted Hayton's Motion to Remand.

2. FAILURE TO STATE A CAUSE OF ACTION. Hayton fails to state a claim for which relief can be granted under FRCP Rule 12(b)(6).

(A) Hayton's claims for fraud and breach of fiduciary duty against Eichelberger individually for failure to comply with the 1979 divorce decree provisions relating to supervision, alteration, and modification of the Plan contract are preempted by ERISA. *Firestone Tire & Rubber Co. v. Bruch*, 109 S.Ct. 948 (1989).

(B) Hayton has no standing to seek to enforce the divorce decree provisions relating to the Plan contract.

(C) Hayton failed to state a cause of action against Eichelberger Trustee/Administrator of the Plan.

The Plan provided that the Plan Administrator had authority to interpret the Plan provisions. Eichelberger Trustee/Administrator argued in federal court the 1979 divorce decree was not a qualified domestic relations order. Hayton argued it was. The district court denied Hayton's motion. Hayton did not appeal and cannot now collaterally attack the final judgment. See *Firestone*, supra; *Harms v. Cavenhorn Forest Industries Inc.*, 92-3321 948, 956 (5th Cir. 1989); *Schuliz v. Metropolitan Life Ins. Col* [sic], 872 F.2d 676, 678 (5th Cir. 1989); *McGann v. H & H Music Co.*, 946 F.2d 401, 405 (5th Cir. 1991) cert. denied 113 S.Ct. 482 (1992); *Wise v. El Paso Natural Gas Co.*, No. 92-8125 (5th Cir.).

(D) *COLLATERAL ESTOPPEL, RES JUDICATA*

(1) Hayton's claims are barred by a state court final judgment in No. 78-32740. A copy of the petition and judgment are attached as Exhibits 3 and 4.

(2) Hayton's claims are barred by a federal court final judgment in No. 82-1436. A copy of the petition and judgment are attached as Exhibits 5 and 6.

(3) Hayton's claims are barred by a bankruptcy court judgment in No. 87-0831, affirmed by federal district court. A copy of the pleading and judgment are attached as Exhibits 7 and 8.

(4) Hayton's claims are barred by an agreed judgment executed with W. Steve Smith, trustee of the Eichelberger bankruptcy estate. Ex.9.

E. LIMITATIONS AND WAIVER. Hayton's claims are barred by limitations and waiver. Without waiver of their objections, that Hayton has no standing and all state court claims are barred by ERISA, Defendants, would alternatively show the Court that the acts complained of by Hayton are barred by limitations under ERISA and the Bankruptcy Code, and the bankruptcy order of discharge.

Additionally, Defendants would show the court that Hayton has waived any rights to future plan benefits by her agreement with Trustee Smith on behalf of the Eichelberger bankruptcy estate, P.A.I and the Plan.

F. ESTOPPEL. Hayton is barred from bringing any further claims in the federal court concerning Defendants and the pension plan by her own actions and judicial admissions. See Exhibits 1, 2, 3, 4, 5, 6. 7, 8, 9.

The time to file claim

IV.

RIGHT TO JURY TRIAL

See objections and Memorandum of Law, adopted and incorporated herein as though fully stated.

V.

RELIEF

P. T. Eichelberger, Jr., M.D., individually; P. T. Eichelberger, Jr., M.D.P.A., sponsor of the P. T.

Eichelberger, Jr., M.D.P.A. Integrated Profit Sharing Plan; P. T. Eichelberger, Jr., M.D., trustee and administrator of the P. T. Eichelberger, Jr., M.D.P.A. Integrated Profit Sharing Plan; and the P. T. Eichelberger, Jr., M.D.P.A. Integrated Profit Sharing Plan request the Court to deny Hayton the relief requested and grant Defendants' Motion to Dismiss for Want of Jurisdiction and for failure to state a cause of action for which relief can be granted under FRCP Rule 12(b)(6), and for sanctions including attorney fees under FRCP Rule 11 and for such other and further relief as to which Defendants may show themselves justly entitled to.

Respectfully submitted,

REBA A. EICHELBERGER
ATTORNEY AT LAW
4303 GARTH ROAD, SUITE 303
BAYTOWN, TEXAS 77521
(713) 428-1242
FAX (713) 420-5575
STATE BAR NO. 06493000
FEDERAL NO. 2796

/s/ Reba A. Eichelberger
REBA A EICHELBERGER

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was provided to counsel of record by fax and U.S. Mail, first class, to-wit:

Date: April 29, 1993

Ms. Janet Mortenson

Mr. Jeffrey Gillespie

Fax copies do not include exhibits

/s/ Reba A. Eichelberger
REBA A EICHELBERGER

APPENDIX 25

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 93-2481

P. T. EICHELBERGER, JR., M.D.
APPELLANT

V.

W. STEVE SMITH, APPELLEE

JANE BAILEY HAYTON, APPELLEE

REQUEST FOR DISQUALIFICATION UNDER 28 U.S.C. 455 and 28 U.S.C. 144

TO THE EN BANC COURT:

P. T. Eichelberger, Jr., M.D. and Reba A. Eichelberger, Counsel and Spouse of P.T. Eichelberger, Jr., M.D. file this motion pursuant to 28 U.S.C. Section 455 and 28 U.S.C. Sec. 144 for investigation and disqualification of Judge Lynn N. Hughes, and in support thereof state the following:

This court should vacate the orders and judgements written by Judge Lynn N. Hughes against Dr. P.T. Eichelberger, Jr. and this Court's order dated August 4, 1994, against Dr. P.T. Eichelberger, Jr., and Reba A. Eichelberger for $5,000.00 and double costs for filing a frivolous appeal. The orders and judgments should be

vacated because, Judge Hughes is disqualified from presiding over any matters pertaining to Dr. P.T. Eichelberger, Jr. and Reba A. Eichelberger under 28 U.S.C. Section 455 and 28 U.S.C. Section 144 because of his extreme personal bias and prejudice against Dr. P.T. Eichelberger, Jr. and Reba A. Eichelberger.

ISSUES BEFORE THE COURT

The first issue before this court in this request for investigation and disqualification of a judge under 28 U.S.C. Section 455 and 28 U.S.C. Section 144 is whether Judge Lynn Hughes' impartiality "might reasonably be questioned" given the facts and circumstances of the case and orders and judgments in the case.

The second issue is whether 28 U.S.C. Section 455 and 28 U.S.C. Section 144 are ambiguous?

Although 28 U.S.C. Section 244 [455] provides a judge with discretion to decide if he should disqualify himself if a party files a motion with sufficient affidavit requesting disqualification, 28 U.S.C. Section 144 does not provide the judge with that discretion. The law is mandatory that when a party makes and files a timely affidavit that the judge before whom the matter is pending has a personal bias or prejudice, "such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding".

In this case, Judge Hughes made the decision not to recuse himself. There was no referral to another judge.

The facts, circumstances, orders and judgments in this case clearly show that a reasonable person would

find that Judge Hughes' impartiality is totally absent. That the bias and prejudice are personal, and obtained from ex parte conferences, and do not stem from testimony or evidence heard during judicial proceedings is supported by the affidavit attached and include the following facts and circumstances:

Before the first witness testified or any evidence was presented, in May 1990, Judge Hughes demonstrated bias, prejudice, and at times, actual disdain for Dr. Eichelberger. Based solely on the allegations and argument of W. Steve Smith and Janet Mortenson, Judge Hughes removed Dr. P. T. Eichelberger, Jr., M.D. as Trustee of the P. T. Eichelberger, Jr., M.D. pension plan. At the time, neither Dr. Eichelberger, as Administrator and Trustee of the plan nor the plan were parties in the lawsuit. He appointed Karen Cole, Trustee of the plan, and ordered the plan assets turned over to her. After an ex parte conference, Judge Hughes accepted Karen Cole's report of the plan and ordered Dr. Eichelberger to attend all hearings.

2. In direct conflict with ERISA and the evidence in the case, after counseling with the litigant's ex spouse's (Hayton) attorney, about the best strategy for the case, Judge Hughes writes a judgment that a 1979 fifth [sic] percent (50%) vested pension plan interest of $75,000.00 is worth $833,263.24 supported only by the hearsay testimony of Hayton's present husband. This after the court has approved a settlement between Hayton, W. Steve Smith and Karen Cole, that her pension plan interest as determined by the 1979 divorce decree of approximately $130,000.00 (of which 35% was vested in 1979) at 8% interest has a value of $509,569.83 less a deduction of

$149,627.66 already distributed to her. The $149,627.66 distribution is valued by the court appointed trustee Karen Cole without appraisal or reference to any of the partnership interest that far exceeds the $33,093.00 interest valued by Karen Cole. The 8% interest is a figure that is picked out of the air by Karen Cole and agreed to by the Judge. A copy of the agreement is attached as Addendum 1.

The deposition of the trustee is quashed by the judge. Judge Hughes, in violation of the bankruptcy law and the discharge order of Dr. Eichelberger, dated November 19, 1990, further orders that ex spouse, Hayton, can recover additional damages and attorneys fees against Dr. P.T. Eichelberger as plan administrator and trustee. Consider, as of October 10, 1989, Steve Smith, bankruptcy trustee of the P. T. Eichelberger, Jr. estate and Hayton's state court injunction enjoined him from any actions concerning the pension plan. Most important is the fact, that Hayton has not filed an adversary proceeding to have such a debt declared nondischargeable, the time for filing such a proceeding under 11 U.S.C. 523 has long since passed. As of June 8, 1990, Judge Hughes had appointed Karen Cole Trustee and ordered all plan funds turned over to her and in 1992 ordered that she distribute the plan assets by December 31, 1992, and terminate the plan. A reasonable person would be strained to find that Dr. Eichelberger, if ever, but especially after 1989, could be held liable for assets and investments when the assets and funds are controlled by the State and Federal Courts, including Judge Hughes.

2. The district judge announces on April 15, 1993, that he will conduct a bench trial on May 4, 1993, in a

case that he remanded to state court over 4 years ago (October 6, 1989) and the state court assumed jurisdiction (October 10, 1989) at the ex spouse's express emergency motion. A copy of the remand order is attached as Addendum 2. On April 23, 1993, Jane Hayton files her claims for relief.

3. The district court grants final compensation to Trustee Smith in the same case that he has entered the final judgment described in this appeal to the trustee, without even the prerequisites required by the bankruptcy code and rules. A copy of the order is attached as addendum 3.

The record is replete with judicial admissions by Judge Lynn N. Hughes, that Jane Hayton's claims, if any, that were declared non-dischargeable were remanded to state court. Judge Hughes admitted to this Court that the Hayton claims declared non-dischargeable were remanded to state court. A copy of that admission is attached as Addendum 4.

It is likewise undeniable that the only debt declared non-dischargeable, if any, pertained to Dr. P.T. Eichelberger, Jr., as trustee under the divorce decree, not as administrator and trustee of the pension plan, and those causes of action were remanded to state court. Copies of the bankruptcy order and District Court's final judgment are attached as Addendum 5 & 6.

Judge Hughes has held at least one ex parte conference with opposing counsel and wrote orders as a result of that conference. It is documented in Addendum 7.

The third issue is whether the appellate panel's decision to sanction Drs. Eichelberger and his counsel spouse, Reba Eichelberger, for appealing the unconstitutional orders violates their judicial oath?

Federal courts cannot countenance deliberate violations of constitutional rights because such countenance would violate their judicial oath to uphold the U.S. Constitution. *Adamson v. C.I.R.* 745 F.2d 541 (9th Cir. 1984). In most instances, the appellate courts are the last enforcers of constitutional rights. It is well known that the United States Supreme Court reviews very few cases.

How can an appellate court sanction an appellant and his attorney for filing an appeal contesting the violations of the U.S. Constitutions, the Code of Judicial Conduct, ERISA, Bankruptcy Code, and the well-settled law of the Fifth Circuit and the United States Supreme Court?

This court cannot avoid its mandatory duty to review these issues. They are fundamental to the whole premise of government espoused by our forefathers when they wrote the U.S. Constitution. "In questions of power, let us hear no more of trust in men, but rather bind them down from mischief with the chains of the Constitution". Thomas Jefferson.

Dr. P.T. Eichelberger and Reba A. Eichelberger have been denied due process and equal protection of the law by the personal bias and prejudice of the District Judge. The panel of the fifth circuit who ruled that this appeal is frivolous have grieviously erred. The order violates the Constitution. The mischief can not stand.

Neither Appellee nor the Fifth Circuit panel have presented a single case that overrules *U.S. v. Rice*, 66 S Ct. 835 (1946) or *New Orleans Public Service v. Majoue*, 802 F2d 166 (5th Cir. 1986) that once a court divests itself of jurisdiction it no longer has jurisdiction to reconsider the ruling even if wrong. Most important, also, is the decision by Judge Jerry Smith in *Medina v. Anthem Life Ins. Co.* that ERISA does not permit extra contractual damages. See *Massachusetts Mut. Life Ins. Co. v. Russell*, 105 S. Ct. 3085 (1985). Dr. P. T. Eichelberger, Jr., and Reba Eichelberger, request the court inform them how the appeal is frivolous? To date, the law in the Fifth Circuit has been that an appeal is frivolous when the appeal has no basis in fact or law.

At the risk of being sanctioned for daring to exercise our constitutional and statutory rights of appealing a judgment that is rendered without jurisdiction, in violation of the U.S. Constitution, ERISA, Bankruptcy Code, the Code of Judicial Conduct, we ask for an investigation and disqualification of Judge Lynn N. Hughes, under 28 U.S.C. Section 455 and 28 U.S.C. Section 144.

Respectfully submitted,

REBA A. EICHELBERGER
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(713) 428-1242
FAX NO. (713) 420-5575
STATE BAR NO. 06493000
FEDERAL ADMISSIONS NO. 2796

_____

REBA A. EICHELBERGER

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document has been served on opposing counsel, Mr. Jeffrey Gillespie, and party in interest, Mr. W. Steve Smith, Trustee, on September 7, 1994, by deposit in the U.S. Mail, Certified Mail RRR.

_____

Reba A. Eichelberger

COUNTY OF HARRIS X
X AFFIDAVIT
STATE OF TEXAS X

On this day, Reba A. Eichelberger, counsel for P. T. Eichelberger, Jr., appeared before me, the undersigned notary public, and after I administered an oath to her, upon her oath, she stated the following facts based on her personal knowledge and belief:

1. My name is Reba A. Eichelberger, and I am the counsel and spouse of P. T. Eichelberger, Jr., the appellant in this case.

2. In 1981, at age 49, while working as an assistant hospital administrator, I began the study of law. Beginning in 1967, as a high school drop out, with three small sons, I worked and earned an associate of degree in nursing, became a nursing director, and while working as a nursing director earned a baccalaureate degree of science and a masters degree in health care administration to reach this entrance to the quintessence of a calling, law. This description is not given to gain approval or compliment, but to show the depth of my motivation and endurance to be a lawyer.

3. In 1984, just prior to graduation, I realized that because I had no prior knowledge of the law or the courts I needed to have actual court experience. I approached Judge Lynn Hughes, presiding judge of the 189th District Court about permitting me to serve as an intern. Words cannot express the gratitude that I felt when he accepted me as an intern for the semester. I believed that we worked well together

although we did not always agree. I know that because of him, I scored well on the bar examinations.

4. It is my firm belief that the bias and prejudice that Judge Lynn Hughes has exhibited towards my husband, Dr. P. T. Eichelberger, Jr., is personal and evolved from events, confidences and communications that Judge Hughes and I exchanged during that internship. How else does one explain a judge's actions in counseling with opposing parties, suggesting strategies, then trying a case that he remanded to state court over four years prior, finding that opposing counsel did not commit perjury when it is documented in the court records, finding a fully paid debt based on a fraudulent proof of claim non-dischargeable, when that judge is dedicated to protection of the constitution?

5. A review of the transcripts of the hearings before Judge Lynn Hughes reveals that beginning in May 1990, before the first witness testified or any evidence was introduced, he demonstrated an absolute bias and prejudice, even distain [sic] towards Dr. P. T. Eichelberger, Jr. His first orders, to remove Dr. P. T. Eichelberger, Jr., as Trustee of the P. T. Eichelberger, Jr., M.D. P. A. Pension Plan and to appoint Karen Cole, Trustee, was made based only on the unsworn allegations and argument of W. Steve Smith and Janet Mortenson. At the hearing, no witness was called and no evidence presented.

Later, after an ex parte conference with W. Steve Smith, Karen Cole, and Janet Mortenson, Judge Hughes ordered that Dr. P. T. Eichelberger, Jr., attend every hearing. Judge

Hughes accepted the report of Trustee Karen Cole concerning the assets and funds of the plan although she never had an appraisal of the plan's partnership interest in real property before distribution of the assets and termination of the plan. Judge Hughes barred Dr. Eichelberger from taking the deposition of Karen Cole concerning her report. Karen Cole distributed one partnership interest of 6% in 24.129 acres of real estate to Jane Hayton and valued it at $33,093.00. At that time there was an actual sale of 63,252 square feet of land for $506,016 for a Walgreen's Store. 6% of $506,016.00 is $30,360.96, leaving 6% in the remaining 22 acres worth $2,733.00, for land selling @$8.00 a square foot. Cole transferred the plan's 11.76% interest in Goose Creek, Ltd. (same street as Walgreen's) to Hayton listing the value at $604.00.

Judge Hughes in total disregard for the U. S. Constitution and the Code of Judicial Conduct, held Dr. Eichelberger and me up to ridicule, during proceedings.

The transcript for the hearing on December 12, 1992, is found in Volume 17. There can be no doubt that on December 12, 1992, Judge Lynn Hughes knew, and by his own admission, the claims were in the state court, that he had prejudged the issues, and that he counseled Jane Hayton's attorney on the strategy to be used.

6. A review of the orders in this case, clearly reveal a deep seated bias and prejudice against Dr. Eichelberger that were in existence long before any judicial proceedings with testimony and evidence. Judge Hughes frequently

wrote orders against Dr. Eichelberger that he didn't even recall.

He did not recall the ex parte conference with W. Steve Smith, Janet Mortenson and Karen Cole but wrote the orders he made during the conference.

Proof of the ex parte conference and the orders issued as a result of that conference are sufficient evidence for any reasonable person to "question Judge Lynn Hughes' impartiality" and warrant his disqualification. Ex parte conferences stand in direct conflict with the U. S. Constitution and 28 U.S.C. Section 453.

Judge Hughes has no discretion to decide to recuse himself under 28 U.S.C. Section 144. When Dr. Eichelberger filed the motion to recuse with affidavit and his own knowledge of his ex parte conference, Judge Hughes could proceed no further.

7. I have not filed this affidavit for any bad faith reason. I have, in fact, attempted to withhold many statements concerning Judge Hughes, because I am so indebted to him, but there is a need for the justice and fairness in this case that has been denied. This affidavit is filed in the exercise of Constitutional and statutory rights.

8. The panel's opinion that the appeal was frivolous is in error. Dr. Eichelberger and I did not file a frivolous appeal. The issues are well settled law as interpreted by the United States Supreme Court and this Fifth Circuit and totally support Dr. Eichelberger's position. The orders and judgments in this case are void, entered without jurisdiction, by a district judge with a

personal bias and prejudice against Dr. Eichelberger and me.

9. Each lawyer is sworn to abide by the Code of Professional Responsibility and to show respect for the courts. Each justice or judge of the United States takes the oath or affirmation that, I, ___, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumben [sic] upon me as justice (or judge) under the Constitution and laws of the United States. So help me God."

A litigant and his attorney should not be afraid to file pleadings or an appeal demanding that the U. S. Constitution be enforced by the enforcers. It is a well known fact that the appellate courts are most often the final protectors because the United States Supreme Court rarely review cases.

Reba A. Eichelberger

SUBSCRIBED AND SWORN TO BEFORE ME this 7th day of September, 1994.

NOTARY PUBLIC *
STATE OF TEXAS

APPENDIX 26

P.T. Eichelberger, Jr.,

Petitioner

v.

W. Steve Smith

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including February 6, 1995.

/s/ Antonin Scalia
Associate Justice of the Supreme
Court of the United States

Dated this 28th

day of November, 1994.